(18)

No. 95-489-CFX Title: Colorado Republican Federal Campaign Committee and Douglas Jones, Treasurer, Petitioners
Status: GRANTED v.
Federal Election Commission

Docketed:
September 21, 1995 Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Baran,Jan Witold

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 18 1995	D	Application (A95-264) to extend the time to file a petition for a writ of certiorari from September 21, 1995 to November 20, 1995, submitted to Justice Breyer.
2	Sep 18 1995		Application (A95-264) denied by Justice Breyer.
3	Sep 21 1995	G	Petition for writ of certiorari filed.
5	Oct 20 1995		Order extending time to file response to petition until November 22, 1995.
6	Nov 22 1995		Brief of respondent Federal Election Commission in opposition filed.
8	Dec 5 1995		Reply brief of petitioners Colorado Republican Federal Campaign Committe, et al. filed.
7	Dec 6 1995		DISTRIBUTED. January 5, 1996 (Page 15)
9	Jan 5 1996		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 15, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. **********
10	Feb 16 1996		SET FOR ARGUMENT MONDAY, APRIL 15, 1996. (1ST CASE).
11	Feb 16 1996		Brief amici curiae of Washington Legal Foundation, et al. filed.
12	Feb 16 1996		Brief amici curiae of Committee for Party Renewal, et al. filed.
13	Feb 16 1996		Brief amicus curiae of National Right to Life Committee, Inc. filed.
14	Feb 16 1996		Brief amici curiae of American Civil Liberties Union, et al. filed.
15	Feb 16 1996		Brief amicus curiae of Republican National Committee filed.
16	Feb 16 1996		Brief amici curiae of Democratic National Committee, et al. filed.
17	Feb 16 1996		Joint appendix filed.
18	Feb 16 1996		Brief of petitioners Colorado Republican Federal Campaign Comm. and Douglas Jones filed.
19	Feb 21 1996		LODGING consisting of conciliation agreements from the three Federal Election Commssion Matters Under Review received from counsel from petitioners
20	Mar 8 1996		CIRCULATED.
21	Mar 15 1996	X	Brief amici curiae of Common Cause and Public Citizen filed.
22	Mar 15 1996	X	Brief of respondent Federal Election Commission filed.

No. 95-489-CFX

Entry	Date	Note	Proceedings and Orders
23	Mar 15 1996	X	Brief amici curiae of Kentucky, et al. filed.
24	Mar 21 1996	G	Motion of Brennan Center for Justice for leave to file a brief as amicus curiae filed.
25	Mar 25 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Tenth Circuit (BOX).
26	Apr 1 1996		Motion of Brennan Center for Justice for leave to file a brief as amicus curiae GRANTED.
27	Apr 5 1996	X	Reply brief of petitioners Colorado Republican Federal Campaign Committee, et al. filed.
28	Apr 10 1996		Record filed.
		*	Original record proceedings United States District Court for the District of Colorado (BOX).
29	Apr 15 1996		ARGUED.

(1)

Supreme Court, U.S.
FILED

NO. 95- 95-489 SEP 21 1995

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS L. JONES, AS TREASURER,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 21, 1995

QUESTIONS PRESENTED

1. Do the limitations imposed by 2 U.S.C. § 441a(d) of the Federal Election Campaign Act ("FECA" or "Act") on the right of political parties to make expenditures "in connection with the general election campaign of a candidate" violate the First Amendment to the United States Constitution, either facially or as applied?

2. Should the limitations that § 441a(d)(3) places on "any expenditure in connection with the general election campaign of a candidate" be construed to restrict a political party's advertising "that involves a clearly identified candidate and an electioneering message," even where, as here, (i) the party has not coordinated with its candidate (or even selected a candidate), (ii) the self-proclaimed "candidate" that is "involved" in the political advertisement is an incumbent congressman and has not been nominated by the opposing party, and (iii) the supposed "electioneering message" does not include "express advocacy" of the election or defeat of anyone, but merely makes statements that a reasonable person might regard as tending to "diminish" support for the "candidate"?

3. Did the United States Court of Appeals for the Tenth Circuit err in giving *Chevron* deference to two advisory opinions of the Federal Election Commission where (i) FECA, 2 U.S.C. § 437(b), forbids the Commission to establish any "rule of law" without following rulemaking procedures, and (ii) the two opinions give no explanation of their conflict with an earlier opinion?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS L. JONES, AS TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Colorado Republican Federal Campaign Committee and Douglas L. Jones as Treasurer[1] respectfully petition this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The September 6, 1995, order of the court of appeals denying the Colorado Party's suggestion for rehearing *en banc*, with three judges favoring rehearing and one recusal, is unreported and is reproduced at Appendix ("App.") 1a-2a bound with this

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[1] All parties to this case are identified in the caption. The Treasurer is a nominal party. For simplicity, the petitioners will be referred to collectively as "Colorado Party" or "Party." In papers below, the term "State Party" was sometimes used.

petition. The June 23, 1995 panel opinion reversing the district court is reported at 59 F.3d 1015 and is reproduced at App. 5a-21a. The August 30, 1993 order and memorandum of decision of the United States District Court for the District of Colorado dismissing the complaint of the Federal Election Commission ("FEC" or "Commission") is reported at 839 F. Supp. 1448 and is reproduced at App. 22a-37a.

JURISDICTION

The court of appeals entered judgment in this case on June 23, 1995. On September 6, 1995, the court of appeals denied the Colorado Party's suggestion for rehearing *en banc*. This petition is being filed within 90 days of the date the court of appeals entered judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

The statute involved in this case is the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 441a(d) (1988), 437f(b) (1988), and 437f(c)(1) (1988). The statutory provisions are set out in their entirety at App. 80a-89a.

STATEMENT OF THE CASE

In the Spring of 1986, the Colorado Party publicly criticized statements by then-incumbent Democratic Congressman Tim

Wirth. At this time, the November, 1986 general elections were over six months away and neither party had selected a nominee for the United States Senate. However, Congressman Wirth had indicated his intent to seek the Democratic Party's nomination for Senate and was using the resultant publicity to advance his political agenda.

The Colorado Party produced and aired *three* radio advertisements and published *two* pamphlets challenging the veracity of Congressman Wirth's statements. App. 93a-106a. Consistent with FECA, donors to the Colorado Party were publicly disclosed, the funds did not come from corporations or unions, and contributions were limited to no more than $5,000 per contributing individual.

One of the three Colorado Party's radio advertisements, entitled "Wirth Facts #1," which ran in early April, stated in full:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

App. 93a. The text of the other advertisements, all of which are very similar, appear at App. 94a-106a.

On June 12, 1986, the Colorado Democratic Party complained to the FEC alleging that the Colorado Party's expenditures to air the radio messages and publish the pamphlets exceeded the Colorado Party's expenditure limits under § 441a(d)(3) of FECA. That provision limits expenditures that a

national or state party can make "in connection with the general election campaign of candidates for Federal office." App. 85a-86a. More than two years later, the FEC concluded, by a vote of 5-1, that the cost of "Wirth Facts #1" constituted expenditures which, when aggregated with the Colorado Party's other spending, exceeded the limit of § 441a(d)(3). App. 56a-61a. The FEC dismissed the allegations regarding the other two radio ads and the two pamphlets because of a 3-3 deadlock vote.[2]

On July 5, 1989, the FEC filed a *de novo* civil action in the United States District Court for the District of Colorado seeking to fine the Colorado Party. App. 38a-47a. On August 30, 1993, the district court granted the Colorado Party's motion for summary judgment and dismissed the FEC's complaint. App. 22a-37a. Drawing on this Court's precedent construing the term "in connection with" under the FECA, the district court ruled that § 441a(d)(3) limits only expenditures for "express advocacy" and that "Wirth Facts #1" did not expressly advocate the election or defeat of any candidate. App. 28a-35a. The district court also ruled *sua sponte* that the Colorado Party's counterclaim that § 441a(d)(3) was unconstitutional was "moot" and dismissed the Colorado Party's constitutional challenge. App. 35a-36a.

On appeal, a panel of the United States Court of Appeals for the Tenth Circuit reversed and remanded and instructed the district court to enter judgment in favor of the FEC and to determine an appropriate civil penalty. App. 21a. "Giving deference to the FEC's interpretation," the panel ruled (App. 16a-17a) that § 441a(d)(3)'s "in connection with the general election campaign" language applies to party spending that "involves a clearly identified candidate and an electioneering message, without regard to whether that message constitutes express advocacy."

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[2] The FEC needs the votes of four commissioners to proceed. *See* 2 U.S.C. § 437c(c) (1988).

The panel ruled (App. 17a) that "Wirth Facts #1" was directed at a clearly identified candidate because Mr. Wirth had informed the FEC of his intent to seek a Senate seat, even though he had not been nominated by his party. It also ruled (App. 17a-19a) that the advertisement contained an electioneering message, despite the fact that the advertisement aired months before either party selected its Senate nominee. The panel based this ruling (App. 18a) on its view that a reasonable person would think that the advertisement tended to "diminish" public support for Mr. Wirth and to "garner support" for "the unnamed [and unselected] Republican nominee." The panel was silent as to how "Wirth Facts #1" differed from the Colorado Party's other radio ads and published pamphlets concerning Congressman Wirth which the FEC had determined were not subject to § 441a(d)(3)'s expenditure limitations.

The court of appeals rejected the Colorado Party's as applied and facial constitutional challenges to § 441a(d)(3). App. 19a-21a. Noting that the "primary purpose" of the contribution and expenditure limitations in the Act is to "prevent corruption or the appearance of corruption," the panel stated (App. 20a) that "[t]he same reasoning the Supreme Court [has] used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees." Despite the FEC's failure to present any credible evidence that state parties corrupt candidates for federal office — and the Colorado Party's production of affirmative evidence to the contrary — the court of appeals, without citation or evidence, concluded (App. 20a) that

> party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures.

Ironically, the Colorado Party is being prosecuted by the government for criticizing an "incumbent officeholder."

Lacking factual support for a corruption rationale, the panel (App. 20a-21a) upheld the constitutionality of § 441a(d)(3) in part because the restrictions on political party expenditures " 'equalize the relative ability of all citizens to affect the outcome of elections' " and help "cap campaign costs and increase accessibility to our political system." The panel (App. 21a) mistakenly relied on *Buckley v. Valeo*, 424 U.S. 1, 56-67 (1976), per curiam, which in fact rejected these grounds.

On August 7, 1995, the Colorado Party timely filed a suggestion for rehearing *en banc*. Four days later, the court of appeals ordered the FEC to file a response to the Party's suggestion (App. 3a). On September 6, 1995, a divided court of appeals denied the Colorado Party's suggestion (App. 1a-2a). Judges Baldock, Ebel and Kelly voted to grant rehearing *en banc*, and Judge Lucero was recused (App. 2a).

The court of appeals' ruling deeply and unjustifiably impairs the Colorado Party's First Amendment rights of association and expression. The Party now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

Few matters of federal law can be more important than those establishing how our political system will operate and how our political representatives will be selected. Such matters are the subject of this petition.

This case presents a First Amendment challenge to an extraordinary statute, § 441a(d) of FECA, which directly but variously limits the ability of political parties to support their own candidates and officeholders or oppose candidates and officeholders from other parties. To this end, the statute imposes caps on the amount that can be spent by a party, with the amount per state varying with state population. Although the limitations nominally apply only to expenditures that are

coordinated with a party candidate, the statute is applied on the premise that *every* party expenditure is so coordinated.

The FEC claims that these restrictions are necessary because a party's influence over its candidates inherently is corrupting, but it has offered neither a congressional finding nor record evidence to support its claim. The court of appeals more accurately suggests (App. 20a-21a) that the restrictions were enacted to equalize the "voices" of competing political views and to reduce political expenditures overall; however this Court has rejected those objectives as a basis for curtailing First Amendment freedoms.

In *Buckley* 424 U.S. at 59, 60 n.67, this Court expressly reserved the question of whether § 441a(d)(3) violates the First Amendment, noting in response to question 3(e) that the First Amendment issues certified by the lower court with respect to § 608(f), now § 441a(d), had not been advanced by the appellants. This case presents that reserved First Amendment issue. It should be resolved.

This case is also important because of the sweeping construction given the challenged statute by the court of appeals. This Court and every other lower court to consider the issue uniformly have held that, to minimize concerns of overbreadth and vagueness, all references to expenditures "in connection with" a federal election and similar terms used in the FECA must be construed to apply only to the "express advocacy" of the election or defeat of an identified candidate.

In the present case, by contrast, the court of appeals ruled (App. 11a-12a) that political speech by political parties merits less protection than speech by banks, corporations, trade unions, and the like. Thus, the panel held (App. 16a-17a) that the statutory limitation on party expenditures in connection with an election should be read broadly to limit every party "electioneering message" that "involves a clearly identified candidate" "without regard to whether that message constitutes express advocacy."

The court of appeals (App. 17a) made clear that an office-holder can become a protected "candidate" merely by announcing that intent to the FEC, even though the party's nominating process has not even begun. Also, it made clear that an electioneering message is one that "would leave a reader (or listener) with the impression that [the sponsoring party] sought to 'diminish' public support for [the self-proclaimed candidate] and 'garner support' for the unnamed" future nominee of the speaking party (App. 18a). Thus, critical statements about the official performance of a congressman without any associated request to vote for or against anyone, are restricted. And the court of appeals found its test satisfied as to speech occurring in early April, even though the general election would not be until November.

Thus, so long as a member of the House of Representatives announces an intent to seek reelection, he or she can be largely shielded from critical commentary by the opposing party. Other office holders, by announcing a candidacy, will be similarly shielded. This unprecedented interference with the political speech of political parties goes to the heart of our system of governance and merits the consideration of this Court.

Finally, this case presents important issues of administrative and election law. The court of appeals here gave *Chevron* deference to a view arguably stated in two of three FEC advisory opinions, without considering that FECA prohibits the use of advisory opinions to establish rules of law.

I. SECTION 441a(d)(3) UNCONSTITUTIONALLY RESTRICTS THE COLORADO PARTY'S CORE FIRST AMENDMENT RIGHTS OF FREE SPEECH AND FREE ASSOCIATION.

The basic problem with a statute that, facially and as applied, restricts political speech by political parties, including speech intended to support party candidates, is that it strikes at the heart of the First Amendment. Even assuming such a statute could be justified, the evidence would have to be rigorous and compelling. No such justification has been offered here.

A. The Colorado Party's Expenditures To Advocate Election Of Its Candidates Are Protected Speech And Association At The Core Of the First Amendment.

"[S]ince virtually all meaningful political communications in the modern setting involve the expenditure of money," expenditures for political speech are speech protected at the core of the First Amendment. *Buckley*, 424 U.S. at 11; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citation omitted) ("[T]he use of funds to support a political candidate is 'speech' . . . 'at the core of our electoral process and of the First Amendment freedoms.' "). Thus, expenditures to discuss public officials and candidates for public office is afforded "the broadest protection" from governmental restriction. *Buckley*, 424 U.S. at 14.

The First Amendment also guarantees a core "right to associate with the political party of one's choice" and to work through such political associations "for the advancement of beliefs and ideas." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (citations omitted); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("[R]ight to associate with the political party of one's choice is an integral part of this basic constitutional freedom.")

First Amendment rights of free speech and association are mutually dependent, as "[t]he two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression," and vice versa. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) (striking ordinance limiting contributions to committees that favor or oppose ballot measures as an impermissible restraint on freedom of association).

B. Section 441a(d)(3) Severely Restricts The Colorado Party's Core First Amendment Rights.

Section 441a(d)(3) of the Act prohibits "a State committee of a political party, including any subordinate committee of

a State committee" from making "any expenditure in connection with the general election campaign of a candidate for Federal office" over a specified dollar amount.[3] This restriction on a State party's ability to advocate the election of its own candidate strikes at the very heart of the First Amendment's guarantees of free speech and association, for the primary way a political party can achieve its goals in the political process is to promote its candidates.[4]

In *Buckley*, the Court held that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." 424 U.S. at 19. The Court reasoned that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.*, at 19 n.18. *Buckley* leaves no doubt that "the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests." *Id.* at 23. The Court expressly reserved in *Buckley* the question of whether the expenditure limits imposed on political parties by § 441a(d) violate the First Amendment. *Id.* at 59 n.67.[5] The court of appeals acknowledged this. App. at 20a, n.11.

The First Amendment interests implicated here — the Colorado Party's right to spend its financial resources to advocate the election of its candidates or to oppose other candidates —

[3] The expenditure ceiling set by § 441a(d)(3) varies from state to state, and was $103,248.54 for the 1986 Senate election in Colorado. *See* FEC *Record* 1 (Apr. 1986).

[4] Freeman, *Political Party Contributions and Expenditures Under the Federal Election Campaign Act: Anomalies and Unfinished Business*, 4 Pace L. Rev. 267, 288 (1988) ("[T]o restrict [the parties'] . . . ability to support their candidates is to restrict the only form of political expression that has any meaning to a major political party.").

[5] The Court rejected a claim that 18 U.S.C. § 608(f), the predecessor of 2 U.S.C. § 441a(d), violated the Fifth Amendment. *Buckley*, 424 U.S. at 58-59 nn. 66 & 67. No First Amendment challenge to what is now § 441a(d) was before the Court in *Buckley*.

are much greater than those implicated by the contribution limits upheld in *Buckley*. In *Buckley*, the Court reasoned that a limit on the amount of a political *contribution* to a candidate is of comparatively less constitutional significance than an expenditure limitation because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21. "The quantity of communication . . . does not increase perceptibly with the size of [the] contribution," and "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

The limit on the Colorado Party's *expenditures* at issue here, by contrast, directly restricts the *quantity* and *quality* of the Colorado Party's political expression by forbidding the Colorado Party from communicating directly to the public its express support for its candidates.

The distinction between contributions and expenditures has led the Court to strike limits on "independent expenditures" as unconstitutional abridgments of the First Amendment in four contexts. *See Buckley*, 424 U.S. at 52 (striking limits on independent expenditures by individuals and by candidates); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497-501 (1985) (striking restrictions on independent expenditures by political action committees); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 268 (1986) (MCFL) (striking restrictions on independent expenditures by incorporated political organizations).

FEC regulations forbid the Colorado Party from making "independent expenditures."[6] The Colorado Party maintains

[6] 11 C.F.R. § 110.7(b)(4) (1995) bars party committees from making "independent expenditures." All party expenditures are by operation of law "coordinated expenditures," although not necessarily in fact "coordinated" with any candidate. In this case, there were no candidates for the Colorado Party to coordinate with because it was so early in the election year.

that it should be permitted to make unlimited "coordinated expenditures" in support of or in opposition to candidates just as other groups are permitted to make unlimited "independent expenditures." Yet all of the Colorado Party's expenditures in support of its congressional candidates are subject to the limitations contained in § 441a(d)(3). The result is ironic and illogical: The Colorado Party (like all state parties) is the only political group that does not have the right to spend unlimited amounts of money in support of its candidates. The restriction is as unconstitutional as are the restrictions on other groups' "independent expenditures."

C. The Restrictions Imposed By § 441a(d)(3) Serve No Compelling Governmental Interest.

The government bears the burden of proving that § 441a(d)(3)'s restriction on the Colorado Party's core First Amendment freedoms is strictly necessary to serve a compelling governmental interest and that the restriction is narrowly tailored to that interest. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 228 (1989); *National Conservative Political Action Comm.*, 470 U.S. at 498. Such a demonstration requires actual *evidence*; the government cannot meet its burden by merely asserting a "hypothetical possibility." *Buckley*, 424 U.S. at 498; *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) ("*NTEU*").[7]

The *only* governmental interest recognized by the Court as sufficient to justify restrictions on political contributions is the

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[7] This past Term, this Court elaborated on the government's burden when it seeks to regulate core First Amendment Rights:

> [W]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.

NTEU, 115 S. Ct. at 1017 (1995) (citation omitted).

prevention of actual or apparent corruption of elected officials. *Buckley*, 424 U.S. at 53. The Court has further defined the kind of "corruption" recognized as compelling in *National Conservative Political Action Committee*: "The hallmark of corruption is the financial quid pro quo: dollars for political favors." 470 U.S. at 497.

During the Colorado Party's direct challenge to the constitutionality of the statute below, the government presented no evidence that § 441a(d)(3)'s limits on speech and association are necessary to prevent *quid pro quo* arrangements between political parties and their elected officials. The FEC asserted an anti-corruption rationale, but made no evidentiary demonstration that the limits are in any way tailored to achieve that presumed goal. The court of appeals also did not identify any evidence of party corruption.

The court of appeals sought to overcome the FEC's inadequate corruption showing by ruling (App. 20a-21a) that § 441a(d)(3) serves to "equalize the ability of all citizens to affect the outcome of elections [and to] cap campaign costs and increase accessibility to our political system." The court of appeals mistakenly said (App. 21a) that *Buckley* endorsed these objectives. However, *Buckley* held (424 U.S. at 48-49, 57) and *Meyer v. Grant*, 486 U.S. 414 confirmed at 426, n.7:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .
>
> [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns.

In fact, there is no evidence that modern political parties "corrupt" elected officials by making *quid pro quo* vote-buying arrangements. The limits themselves, which are based on

state populations, refute an "anti-corruption" purpose. For example, a political party in California (or another large state like New York, Florida, Texas, Pennsylvania or Illinois) may spend over $1 million dollars under the § 441a(d)(3) "limit," almost *ten times* more than a Colorado party. *See* FEC 20 *Record* 3 at 5 (Mar. 1994). It is not that Colorado parties are ten times more corrupt than California parties. These limits simply cap spending arbitrarily. Political parties in states larger than Colorado can and do spend over $1 million without the actuality or appearance of corruption. Thus, there is no logical nexus between the limits and the purported governmental interest.

In addition, the legislative history of § 441a(d)(3) reflects no deliberation or evidence on the corruptive effects of political parties. Quite to the contrary, the legislative history reflects a very positive view of political parties and their role in the political process.[8] The only justification reflected in the legislative history for the limitations in § 441a(d)(3) is an arbitrary desire for across-the-board expenditure limits, without regard for the necessity of each limit. Indeed, the sole purpose identified to justify party expenditure limits was to support campaign spending ceilings, and they were subsequently held unconstitutional.[9]

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[8] *See, e.g.*, S. Rep. No. 689, 93d Cong., 2d Sess. 7-8 & 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5593-94 & 5601.

[9] The only reason Congress identified to justify party expenditure limits was the preservation of across-the-board campaign spending ceilings, and the legislative history reflects the concern that unlimited party spending would be a "loophole" in campaign spending ceilings. *See* 120 Cong. Rec. S5411-15 (daily ed. Apr. 8, 1974) (statements of Sens. Clark, Brock, Cannon) (discussions regarding amendment No. 1102, lifting limits on parties, and amendment No. 1152, reimplementing limits on parties).

Buckley v. Valeo subsequently struck campaign spending ceilings and rejected their underlying rationale of effecting a level playing field, but party spending limits remained in effect despite removal of their *raison d'etre*. 424 U.S. at 54. Thus, party expenditure limitations are merely a vestige of an illegitimate rationale — the equalization of political resources.

Second, the Colorado Party is allowed by law to accept contributions only from individuals or political committees (not corporations or unions), and only in amounts less than $5,000 per year.[10] It accepts contributions from diverse sources. It must and does publicly report all such receipts, as well as all of its expenditures. Given these restraints, there is no demonstrable (or even apparent) threat of corruption, and certainly no threat so substantial as to justify an outright limitation on political speech.

Third, the voluntary nature of the Colorado Party *per se* precludes any potential for corruption. The Court has expressly noted that restrictions on independent expenditures are unjustifiable for entities "akin to voluntary political associations." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990), *MCFL*, 479 U.S. at 263. The Colorado Party's candidates voluntarily choose to associate with it and to represent it, and may choose to disassociate from the party at any time. Thus the Colorado Party is not merely "akin" to a voluntary political association; it is one, and it has precisely the "essential features" that *Austin* say exempt even a corporation from limits on expenditures. *Id.* at 662-63.

Fourth, the Colorado Party's candidates seek and obtain nomination on the basis of each candidate's voluntary association with the prevailing party views. Even where there may be policy disagreements between the candidate or elected official and the Colorado Party, the candidate's choice to support the party's position is not evidence of the kind of *quid pro quo* "corruption" described in *Buckley*. In upholding the right of political action committees to make unlimited independent expenditures, the Court has stated that

> [t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to

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[10] The State Party may also receive transfers from other party committees, but those committees also cannot accept corporate funds and otherwise are subject to donation limitations. *See* 2 U.S.C. §§ 441a & 441b.

> political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

National Conservative Political Action Comm., 470 U.S. at 498. This reasoning, which the Court applied to third-party "special interest" groups, logically applies to the broader-based political parties with even stronger force.[11]

Fifth, there is ample evidence that the limitations on the Colorado Party imposed by § 441a(d)(3) actually engender corruption by encouraging candidates to rely disproportionately upon independent expenditures and contributions from a vast number of third-party "special interest" groups, thus tying elected officials more closely to narrow, self-interested groups than to their own broad-based political party.[12] Unshackling political parties would "reduce the candidate's dependence on

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[11] *See Rosario v. Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting) ("Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership.").

[12] *See* Larry J. Sabato, *The Party's Just Begun* at p. 223 (1988) ("The less party money there is available, the more candidates will have to rely on PAC money; the more resources the parties can share with their nominees, the less officeholders will be indebted to special interest groups."); Robert J. Huckshorn & John F. Bibby, *State Parties in an Era of Political Change in The Future of American Political Parties* at p. 91 (Joel L. Fleishman ed. 1982) ("The act imposes expenditure and contribution limits on the support that can be provided by parties to candidates. As a result, congressional and senatorial candidates must rely heavily on nonparty sources for funds."); F. Christopher Arterton, *Political Money and Party Strength in The Future of American Political Parties* at p. 118 (Joel L. Fleishman ed. 1982) ("[T]he most detrimental aspects of the law for political parties come about through the advantages open to institutional competitors.") (collecting data); Frank J. Sorauf & Scott A. Wilson, *Campaigns and Money; A Changing Role for the Political Parties? in The Parties Respond* at p. 191 (L. Sandy Maisel ed. 1990) ("[P]olitical parties'] financial role does not appear very great relative to that of other actors.") (collecting data).

outside contributions and thereby counteract the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."[13] *Buckley*, 424 U.S. at 53 (footnote omitted).

In conclusion, the FEC's assertions below concerning "backdoor" contributions are wholly unsupported by any legislative history or record evidence and are, in fact, untrue. Parties can accept only certain limited donations. Moreover, parties simply do not and by their nature cannot corrupt their own candidates, and thus there is no justification for the restrictions imposed by § 441a(d)(3). At the same time that the court of appeals suggests (App. 20a) that political parties "often are controlled by incumbent officeholders," the Colorado Party is being prosecuted by the government for criticizing an "incumbent officeholder." Section 441a(d)(3) should be declared unconstitutional to permit the Colorado Party, and all political parties, to exercise unfettered First Amendment rights.

II. LIKEWISE, § 441a(d)(3) AS APPLIED TO THE COLORADO PARTY IS UNCONSTITUTIONAL.

On appeal, the Colorado Party contended that applying § 441a(d)(3)'s expenditure limit to "Wirth Facts #1" in the manner the FEC suggested (and the court of appeals adopted) unconstitutionally discriminated based on the content of the Party's speech and that § 441a(d)(3) was impermissibly vague.

Restrictions on First Amendment rights that discriminate based on content are strongly disfavored, unless there is a nexus between the content discrimination and a compelling

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[13] *See* Herbert E. Alexander, *Financing Politics* at p. 172 (4th ed. 1993) ("Strengthening the role of the political parties is one way to offset some of the influence of PACS . . . Currently some candidates may receive hundreds of thousands of dollars in the aggregate from PACs, yet the law prevents parties from competing by providing candidates with similar large amounts."); David E. Price, *Bringing Back the Parties* at p. 260 (1984) ("[Lifting party limits] would give added advantages to parties vis-à-vis PACs and make the parties and candidates less reliant on immoderate direct-mail appeals.").

governmental interest. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue . . . Such power in government to channel the expression of views is unacceptable under the First Amendment.") (citations omitted).

In addition, " '[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity' " and must provide clear notice and guidance to political participants. *Buckley*, 424 U.S. at 41, n.48 (citation omitted). If the government is permitted to do otherwise,

> vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'

Id. (citations omitted).

The court of appeals' deference to the FEC's "interpretation" of § 441a(d)(3) results in content-based censorship. For example, the FEC, without explanation, and by a 3-3 vote, concluded that the Colorado Party may advertise without restriction if the tag lines of its advertisements said

> That's not the way we do things in Colorado. You can't change the facts, Tim []

(App. 105a) but (without explanation and by a 5-1 vote) concluded that the following language was subject to a spending limit:

> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

(App. 93a). Thus, content controls, and there is no connection between such content-based limitation of protected speech and

the FEC's purported governmental interest of preventing corruption. Therefore, § 441a(d)(3), as applied to the Colorado Party, unconstitutionally discriminates based on the content of the Party's speech. *First Nat'l Bank*, 435 U.S. at 784.[14]

Furthermore, the government's standard is so vague that the only sure way to satisfy it is for a political party to avoid criticism of any officeholder who may be considered a candidate. In order to comply with the limits, the Colorado Party and other political parties must evaluate implied as well as express "electioneering messages" and must divine whether a voter or a government official might find a given message sufficient to motivate, in whole or in part, a vote for or against an incumbent officeholder. In addition, parties will have to make prospective assessments of who the likely candidates might be and what opposition might emerge.

The court of appeals did not account for key facts in the record. It failed to note: (1) that the Colorado Party not only aired "Wirth Facts #1" but also aired other radio advertisements and published pamphlets criticizing Congressman Wirth; and (2) that after nearly ten years of litigation, the FEC could not articulate a factual or legal distinction between "Wirth Facts #1" and the other advertisements and pamphlets that the Colorado Party produced and which were dismissed by virtue of an evenly-deadlocked agency.

In essence, the court of appeals leaves the Colorado Party and other state political parties with a "totality of the circumstances" test in which the application of § 441a(d)(3)'s restrictions can never be known in advance without subjective governmental review and approval. Given the above, § 441a(d)(3) as applied here is hopelessly and unconstitutionally vague.

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[14] Moreover, it is unclear whether the court of appeals even considered the Colorado Party's contention that § 441a(d)(3) as applied was an unconstitutional content-based restriction. Only one sentence in the panel's 20-page opinion addressed this issue. *See* App. 21a.

III. IF IT WERE CONSTITUTIONAL, § 441a(d)(3) WOULD RESTRICT ONLY COORDINATED EXPENDITURES FOR EXPRESS ADVOCACY OF THE ELECTION OR DEFEAT OF A CLEARLY IDENTIFIED CANDIDATE IN THE GENERAL ELECTION.

The court of appeals interpreted § 441a(d) so broadly that it has the practical effect of shielding government officeholders and others from critical commentary by the opposing party at any time prior to a federal election, provided they have indicated an intent to run. The effect is particularly acute with respect to members of the House of Representatives, who face election every two years, and who generally are candidates for reelection until and unless they announce for another office or retire.

To reach this unfortunate result, the court of appeals (i) discounted highly pertinent rulings of this Court, including one case construing the very same language in similar and adjacent sections of the same statute, (ii) denied the obvious First Amendment concerns that its construction presents, and (iii) purported to defer to a hazy FEC view it detected in two of three private advisory opinions that, under 2 U.S.C. § 437f, cannot establish a "rule of law." In each of these respects, the court of appeals erred.

A. The Court Of Appeals Should Have Followed This Court's Construction Of Identical Language From The Same Statute.

Section 441a(d)(3) limits expenditures by national and state political parties "in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party." It is one of several similar FECA provisions that have been construed by this Court. All of the other provisions of law have been given the same narrowing construction.

For example, another section of FECA, 2 U.S.C. § 441b, restricts expenditures by national banks, corporations, or labor

organizations "in connection with any election to any [federal] political office." To avoid constitutional issues of vagueness and overbreadth, this Court held that the "in connection with" language applied only to "express advocacy" of the election or defeat of an identified candidate. *MCFL* 479 U.S. at 249.

MCFL adopted its express advocacy standard from the narrowing construction given to several portions of FECA in *Buckley*. For example, former § 608(e)(1) of FECA restricted certain independent expenditures "relative to" a candidate for federal office. *Buckley* interpreted the "relative to" language to encompass only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Similarly, former § 434(e) and (f) of FECA (now § 434(c)(1)) restricted political " 'contributions or expenditures' " made " 'for the purpose of . . . influencing' " the nomination or election of candidates for federal office. *Id.* at 77. Again the Court applied a narrowing construction, holding that this encompassed only contributions or expenditures for express advocacy. 424 U.S. at 74-75.

The court of appeals in this case discounted these rulings. Citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934), it pointed out that identical words in a statute may be found in "such dissimilar connections as to warrant the conclusion that they were employed . . . with different intent." To show such "dissimilar connections," the court of appeals reasoned that, since the FEC treats all party spending as coordinated with the party's candidate, the expenditure limit imposed by § 441a(d)(3) really is a contribution limit, and *Buckley* holds that contributions may be regulated more freely than the "expenditures" such as *MCFL* and *Buckley* involved.

This is an extremely weak reed. *Buckley* itself required express advocacy with respect to both "*contributions* and expenditures" regulated by former § 434(e). *Id.* at 74 (emphasis added). Moreover, the language of § 441a(d)(3) expressly limits "expenditures," even if they may have some aspects of a contribution in some cases. The "in connection with" language

of § 441a(d)(3) serves the same descriptive and limiting function as the identical language construed in *MCFL* and the parallel "relative to" language construed in *Buckley*. Also, the language of § 441a(d)(3) presents the same issues of vagueness and overbreadth as the language this Court has interpreted to require express advocacy. These circumstances do not show that § 441a(d)(3) has such a "dissimilar connections" from the other similar provisions of FECA as to suggest a different meaning.

B. The Broader Interpretation Adopted By The Court Of Appeals Raises Serious Constitutional Problems.

The surprising result of the court of appeals' analysis is that political speech by a political party is more highly restricted than political speech by a corporation. Moreover, the restriction strikes at the core function of a political party, limiting its discussion of incumbent office holders from the opposing party. The restriction is not limited to a few months during a general election, but encompasses any period of time during which an officeholder is a candidate under FECA.[15]

These extraordinary restrictions on political speech are not supported by *any* legitimate congressional finding, much less a finding that this Court's precedents would accept as authoritative. Indeed, when the FEC was unable to find any support for an anti-corruption rationale, the court of appeals suggested (App. 20a-21a) that the true purpose of § 441a(d)(3) is "to equalize the ability of all citizens to affect the outcome of elections [and to] cap campaign costs." Historically, the court of appeals probably is right, but such justifications were expressly

[15] Under § 431(2)(A) of FECA, a person is a "candidate" upon raising or spending $5,000. According to a recent FEC press release, the 435 House incumbents raised $45.5 million during the first six months of 1995. *See* Sept. 1, 1995 FEC Press Release at 1. Thus, virtually all current House incumbents are candidates for the 1996 elections.

repudiated in *Buckley*, 424 U.S. at 48-49, 57, and *Meyer*, 486 U.S. at 426 n.7 (1988).

At minimum, therefore, the court of appeals erred in failing to recognize that its expansive interpretation of § 441a(d)(3) raises serious constitutional issues that could be minimized by applying the express advocacy standard developed by this Court.

C. The FEC Advisory Opinions Do Not Justify Disregarding This Court's Rulings.

Having rejected the rulings of this Court, the court of appeals concluded that it "must defer" to the FEC's expansive view of § 441a(d)(3) purportedly reflected in two advisory opinions, FEC Advisory Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (1984) and FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (1985). In fact, it substantially overread both of those advisory opinions. But beyond that, it committed two more fundamental errors.

First, the panel uncritically assumed that *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), mandates deference to any statement of position by the FEC. In fact, *Chevron* is clear that its delegation of authority to agencies must be consistent with what congress mandated and intended. *Id.* at 844. Here, because Congress was very concerned as to how the FEC might exercise its authority, it inserted into § 437f(b) of FECA the following provision:

> Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

The provisions of § 438(d) referred to require the FEC to give advance notice of any such "rule of law" to Congress in the form of a statement setting out the proposed rule and providing "a detailed explanation and justification." *Id.* This was not done with the advisory opinions on which the court of appeals relied. Moreover, § 437f(c)(1) of FECA provides that advisory opinions should not be extended beyond "any specific transaction or activity which is indistinguishable in all its material aspects." *Id.*

When the FEC acts in other ways, particularly by rulemaking, it may be entitled to *Chevron* deference. This Court has said that the FEC is the type of agency that may merit deference. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). However, the FEC has no authority to establish general principles or rules of law using advisory opinions and thus it was legal error for the panel to rely on those opinions.

Beyond this, the court of appeals expressly noted (fn. 7) that the two opinions it relied upon were inconsistent with an earlier opinion, FEC Advisory Opinion 1978-46, Fed. Election Camp. Fin. Guide (CCH) ¶ 5348 (1978) that "appears more restrictive," that is, requires express advocacy. However, the court of appeals concluded (at n.7) that *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991), compelled it to "give the current view deference if the current construction is reasonable." In fact, the cited portion of *Rust* makes clear that the current view must not only be reasonable in itself, but it also must provide a reasonable explanation for the agency's change in position. *Id. See also Transcanada Pipelines, Ltd. v. FERC*, 24 F.3d 305, 310 (D.C. Cir. 1994); *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1381 (D.C. Cir. 1985). The two opinions to which the court of appeals deferred do not even acknowledge, much less explain, their differences in analysis from the earlier opinion.

CONCLUSION

For the foregoing reasons, the Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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September 21, 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433
93-1434
(D.C. No. 89-N-1159)

FEDERAL ELECTION COMMISSION,
Plaintiff-Counter-Defendant/Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
DOUGLAS JONES,
Defendants-Counter-Claimants/Appellants/Cross-Appellees.

ORDER
Entered September 6, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LOGAN Circuit Judges and REED*, District Judge.

***The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.**

This matter comes on for consideration of appellants/cross-appellees Colorado Republican Federal Campaign Committee and Douglas Jones' suggestion for rehearing in banc.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was

transmitted to all of the judges of the court who are in regular active service. The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Judges Baldock, Ebel and Kelly voted to grant rehearing. Judge Lucero is recused.

Entered for the Court

PATRICK FISHER, Clerk

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Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433
93-1434
(D.C. No. 89-N-1159)

FEDERAL ELECTION COMMISSION,
Plaintiff-Counter-Defendant/Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DOUGLAS JONES,
Defendants-Counter-Claimants-Appellants/Cross-Appellees.

ORDER

Filed August 11, 1995

Before HENRY and LOGAN, Circuit Judges, and REED*, District Judge*

*** The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.**

Within ten days of the date of this order, the Federal Election Commission shall file a response to the petition for rehearing in banc filed by the Colorado Republican Federal Campaign Committee and Douglas Jones.

Entered for the Court
PATRICK FISHER, Clerk

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Deputy Clerk

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 93-1433 &
93-1434

FEDERAL ELECTION COMMISSION,
Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DOUGLAS JONES,
Defendants/Counter-claimants/
Appellants/Cross-Appellees.

Appeals from the United States District Court for the District of Colorado
(D.C. No. 89-N-1159)

Jan Witold Baran (Thomas W. Kirby, Carol A. Laham and Lee E. Goodman, also of Wiley, Rein & Fielding, Washington, D.C., with him on the briefs) for the Colorado Republican Federal Campaign Committee and Douglas L. Jones.

Richard B. Bader, Associate General Counsel (Lawrence M. Noble, General Counsel, and Rita A. Reimer, Attorney, also of Federal Election Commission, Washington, D.C., with him on the briefs) for the Federal Election Commission.

Before HENRY and LOGAN, Circuit Judges, and REED, District Judge.*

LOGAN, Circuit Judge.

The Federal Election Commission (FEC) appeals from the dismissal on the merits of its underlying suit filed against the Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones (collectively the Committee) alleging violations of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-442. The Committee cross-appeals from the dismissal as moot of its counterclaim challenging the constitutionality of the FECA expenditure limitations. We hold that the Committee expenditures at issue did violate the coordinated expenditure limitation in 2 U.S.C. § 441a(d)(3). We also reach the constitutional issue and hold that § 441a(d)(3) does not violate the Committee's First Amendment rights.

This action stems from the 1986 United States senatorial campaign in Colorado, and pre-election spending by the Committee. In January 1986, then-congressman Timothy E. Wirth had registered with the FEC as a candidate for the Democratic nomination for the U.S. Senate. Several months later, but before either political party had nominated senatorial candidates, the Committee spent $15,000 for a radio advertisement directed at Wirth's announced candidacy ("Wirth Facts #1").[1] This spending prompted the Colorado Democratic Party's administrative complaint with the FEC

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.

[1] Wirth Facts #1 read:

> Paid for by the Colorado Republican State Central Committee.

(footnote continues)

alleging that it was an "expenditure in connection with" the general election campaign of a candidate for federal office in violation of the spending limits set out in FECA § 441a(d)(3).

The FEC made a probable cause determination that the Committee violated the FECA. When the parties were unable to reach a settlement the FEC filed suit. The FEC alleged that the Committee failed to report the amount spent on the anti-Wirth publicity as an "expenditure in connection with" the general election campaign, in violation of FECA §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). The Committee counterclaimed, alleging that the FECA was an unconstitutional infringement on its First Amendment rights. In ruling on the parties' cross motions for summary judgment, the district court dismissed the underlying action after finding no FECA violation, and dismissed the counterclaim as mooted by its merits ruling. These appeals followed.

I

We first address whether the district court correctly concluded that the Committee did not violate the FECA. We review de novo a district court's grant of summary judgment using the same legal standards as the district court. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1237 (10th Cir.), *cert. denied*, 113 S. Ct. 98 (1992).

(footnote continued)

> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

I Jt. App. 95-96.

A

The FECA regulates contributions made to federal candidates and political parties, and expenditures made by persons and political committees. It also imposes recordkeeping and reporting requirements. The Committee acknowledges that it is subject to the FECA as a federally registered committee of the Colorado Republican Party.

The statute limits monetary contributions and expenditures by state and national political party committees as follows:

> (d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000.

2 U.S.C. § 441a(d)(1) and (3). A state political party committee may assign to a designated agent (including a national party committee) the right to make the expenditures the state party could have made. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41-43 (1981) (*DSCC*). Here the Committee expended funds on the anti-Wirth publicity after assigning to the National Republican Senatorial Committee the authority to make all of the expenditures—$103,248—it was allowed under § 441a(d)(3) for the 1986 U.S. Senate election. *See* I Jt. App. 4, 14; II *id.* 473. The Committee did not report the $15,000 anti-Wirth publicity expense under 2 U.S.C. § 434(b)(4)(H)(iv),[2] instead characterizing it as an expense for "Voter Information to Colorado Voters—Advertising." II App. 478, ¶ A. The narrow issue is whether the anti-Wirth publicity expense was an "expenditure in connection with the general election campaign" pursuant to § 441a(d)(3) and should have

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[2] 2 U.S.C. § 434(b)(4)(H)(iv) reads in part:

> (b) Contents of reports
>
> Each report under this section shall disclose—
>
> . . .
>
> (4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:
>
> . . .
>
> (H) for any political committee other than an authorized committee—
>
> (i) contributions made to other political committees;
>
> (ii) loans made by the reporting committees;
>
> (iii) independent expenditures;
>
> (iv) expenditures made under section 441a(d) of this title; and
>
> (v) any other disbursements.

been reported accordingly. If so, the Committee exceeded the § 441a(d)(3) monetary ceiling.

As relevant here, the FECA addresses two types of campaign expenditures: independent and coordinated.[3] A coordinated expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley v. Valeo*, 424 U.S. 1, 47 n.53 (1976). *See also* 11 C.F.R. § 110.7(b)(4). Because political parties are considered incapable of making independent expenditures, the district court correctly found that the anti-Wirth publicity expense was a coordinated expenditure. *See DSCC*, 454 U.S. at 29 n.1. If that spending was an "expenditure[] in connection with" the campaign it was subject to the monetary limitations at § 441a(d). *Id.* The district court concluded that the Committee's coordinated expenditure on the anti-Wirth publicity was not made in connection with the 1986 Colorado senatorial campaign, and therefore was not subject to the § 441a(d)(3) limits.

B

The FECA does not clearly manifest the meaning Congress intended to attach to the "expenditures in connection with" language in § 441a(d)(3). Acknowledging that there were no controlling or persuasive cases interpreting that section, the district court relied upon *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), and its interpretation of

[3] An independent expenditure is "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

FECA § 441b. Section 441b[4] restricts the contributions and expenditures of national banks, corporations, or labor organizations. The Supreme Court in *MCFL* considered whether Massachusetts Citizens for Life, Inc., a nonprofit, nonstock corporation, by financing a newsletter urging voter support for

[4] 2 U.S.C. § 441b provides in relevant part as follows:

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus, held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept/or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(2) For purposes of this section and section 791(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

identified pro-life candidates, violated the "independent spending" limitations in § 441b. *Id.* at 241. Interpreting the term "expenditure in connection with any election" the Court held that the expenditure "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.11." *Id.* at 249.

MCFL relied upon the *Buckley* opinion's interpretation of a limitation on independent expenditures "relative to" a clearly identifiable candidate. To avoid invalidating on vagueness grounds what was then FECA § 608(e)(1), the *Buckley* Court held the term encompassed only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. The opinion clarified in a footnote that this construction would restrict the application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* n.52. *MCFL* adopted the same definition, referencing the same footnote, for purposes of § 441b's independent spending limitation. 479 U.S. at 249.

The district court, noting the identity of the "expenditures in connection with" language in § 441b and in § 443a(d)(3), concluded that the anti-Wirth publicity was not express advocacy and therefore not governed by the 441a(d)(3) limitations. The district court relied in part on a common law rule of statutory construction that identical words used in different sections of the same statute generally should be given the same meaning. However, the Supreme Court has also stated that "the presumption readily yields to the controlling force of the circumstance that words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helvering v. Stockholms Enskilde Bank*, 293 U.S. 84, 87 (1934).

Further, we cannot overlook a significant distinction between *Buckley* and *MCFL* and the instant case. The *Buckley*

opinion distinguished between independent expenditures—regulated by then FECA § 608(e)(i)—and coordinated expenditures. The *Buckley* opinion unequivocally stated that controlled or coordinated expenditures are treated as "contributions rather than expenditures" under the FECA.[5] 424 U.S. at 46-47 & n.53. Although *Buckley* found the ceiling on independent expenditures failed to serve substantial enough government interests to be constitutional, it reached the opposite conclusion as to the limitations on expenditures by national or state political parties. *Id.* at 55-59 & n.67 ("Does 18 U.S.C. § 608(f) (1970 ed., Supp. IV) violate [constitutional] rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office? Answer: NO, as to the Fifth Amendment challenge advanced by appellants."). *Buckley* accepted the FECA's treatment of expenditures by national and state committees of political parties as contributions, as have subsequent opinions of the Supreme Court. *See DSCC*, 454 U.S. 27, 29 n.1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such 'independent' expenditures by the national and state party committees."). Similarly, *MCFL* made the same distinction when interpreting the meaning of independent expenditure limits in § 441b. *MCFL*, 479 U.S. at 259-60.

Subsequent amendments to the FECA include "expressly advocating" into the definition of independent expenditures. *See* 2 U.S.C. § 431(17). Coordinated expenditures of political parties, however, are not defined in this manner. *See id.* § 431(9)(B)(ix); *cf. id.* § 431(8)(B)(v), (x), (xii) (what is not a contribution). This is some evidence of congressional intent that the phrases are not intended to have the same meaning.

The distinction between independent expenditures and political party expenditures that are deemed to be contributions,

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[5] Coordinated expenditures are treated as campaign contributions that must be reported pursuant to § 441a(a)(7)(B)(i).

and their different treatment by the Supreme Court, negates the necessity that "expenditures in connection with" be construed identically in different sections of the FECA. However, the meaning of "expenditures in connection with" is not perfectly clear, else the Court in *MCFL* would not have had to cabin its meaning under § 441(b) in the manner it did. The question then becomes whether we must construe the phrase as narrowly as the Supreme Court did in *MCFL* in order to uphold its validity.

C

The FEC has issued advisory opinions interpreting the "expenditures in connection with" phrase in § 441a(d)(3) in a manner different than that adopted by the district court and urged upon us by the Committee. We believe this is an appropriate circumstance in which to follow the Supreme Court's admonishment that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (footnote omitted); *see also DSCC*, 454 U.S. at 37 (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded").[6]

FEC Advisory Opinion 1984-15 addressed questions raised by the Republican Party regarding spending for a series of television ads denigrating the potential Democratic presidential candidates, relating to an upcoming election. The FEC

[6] We note that one of the reasons the *Buckley* opinion gave for its "express advocacy" restrictive interpretation of 608(e)(1)'s "relative to" language was that most who were subject to the statute's criminal sanctions had no right to obtain an advisory opinion of the FEC. *See* 424 U.S. at 40 n.47. It noted that only candidates, federal office holders and *political committees* had that right. *Id.* Section 441a(d), at issue before us, applies only to political committees; thus all to whom it applies can secure advisory opinions from the FEC.

responded to a specific question whether such spending was within the limitations of § 441a(d).

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (May 31, 1984) (footnote omitted). The opinion then concluded that the spending in question was a coordinated expenditure subject to the limitations in § 441a(d)(2).

Advisory Opinion 1985-14 responded to questions from a Democratic Congressional Campaign Committee regarding proposed publicity focusing on a number of congressmen, not all with announced opposition candidates. A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (May 30, 1985). The opinion endorsed Advisory Opinion 1984-15 with its construction of § 441a(d) as regulating expenditures that "both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message."[7]

The FEC has "primary and substantial responsibility for administering and enforcing" the FECA. *Buckley*, 424 U.S. at 109. The FEC argues that its construction of § 441a(d) as regulating political committee expenditures depicting a clearly

[7] Advisory Opinion 1978-46 appears more restrictive; it can be read to adopt the express advocacy position. A.O. 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978). But even if the more recent decisions represent a change in position by the FEC we must still give the current view deference if the current construction is reasonable. *Rust v. Sullivan*, 500 U.S. 176, 186-87 (1991).

identified candidate and conveying an electioneering message is a reasonable one to which we must defer. Viewing the party expenditures as contributions, as we must, we agree.

"[T]he primary interest served by the Act is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC*, 454 U.S. at 41. The Supreme Court cases have distinguished between the potential for corruption that attaches to contributions and coordinated expenditures, and those that might develop from independent expenditures, finding less inherent risk in the latter. Our analysis, therefore, with respect to controls on coordinated expenditures and contributions under § 441a is different than that required for § 441b.

Section § 441a(d) addresses the concern that large contributors to political parties will exert undue influence on a candidate if elected to office. The monetary ceiling on coordinated expenditures by political organizations diminishes the potential of such undue influence but preserves the important role of political parties. *See DSCC*, 454 U.S. at 41. In contrast, the purpose behind § 441b is to prevent corporate and labor expenditures from effectively acting as "political war chests" on behalf of candidates, because these organizations could use funds "amassed in the economic marketplace . . . (for] unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. The FECA thus provides different regulations tailored to different perceived evils.[8] Independent expenditures are theoretically unlimited but such expenditures in excess of low limits must be reported, along with identification of those who contributed more than $200. Contribution limits still apply. Giving deference to the FEC's interpretation, we hold that § 441a(d)(3) applies to coordinated-spending that involves a clearly identified candidate and an electioneering message,

[8] We have already discussed how subsequent FECA amendments have adopted the "express advocacy" criteria to differentiate between independent and coordinated expenditures.

without regard to whether that message constitutes express advocacy.

D

The Committee does riot seriously contest that the anti-Wirth publicity was directed at a clearly identified candidate. "Wirth Facts #1" referenced Wirth's senatorial aspirations and challenged his personal integrity and campaign statements in the context of the current election.[9] Wirth was not yet the Democratic nominee, but the FECA regulates coordinated expenditures made before the primary election. A.0. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766. The Committee's objective to elect the eventual Republican candidate is not diminished because a Democratic nominee has not emerged. *See Buckley*, 424 U.S. at 79 (major purpose of expenditures by candidates and political committees "is the nomination or election of a candidate").

We next consider whether "Wirth Facts #1" contained an electioneering message.[10] Advisory Opinion 1984-15 examined proposed television advertising by the Republican National Committee that would "question or challenge the candidate's statements, position, or record." The FEC concluded that the

> clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever

[9] *See also* 2 U.S.C. S 431(18) which reads:

> The term "clearly identified" means that—
>
> (A) the name of the candidate involved appears;
>
> (B) a photograph or drawing of the candidate appears; or
>
> (C) the identity of the candidate is apparent by unambiguous reference.

[10] We agree with the district court that the message in "Wirth Facts #1" would not constitute express advocacy within the narrow definition of *Buckley* and *MCFL*. It lacks the express words "vote for" or "vote against," or words of similar import, although it comes close when the ad suggests that an identified candidate distorted his voting record.

> may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate . . . . These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (citation and footnotes omitted). The next year, the FEC relied upon that construction in rendering Advisory Opinion 1985-14 to the Democratic Congressional Campaign Committee stating that "[e]lectioneering messages include statements 'designed to urge the public to elect a certain candidate or party.' " A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)).

Any reasonable reading of "Wirth Facts #1," which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to "diminish" public support for Wirth and "garner support" for the unnamed Republican nominee. "Wirth Facts #1" unquestionably contained an electioneering message. We conclude that the anti-Wirth publicity was an "expenditure in connection with" the 1986 Colorado senatorial election because it named both a clearly identifiable candidate and contained an electioneering message. The Committee, therefore, violated the FECA by making a § 441a(d)(3) expenditure after delegating to the National

Republican Senatorial Committee the authority to spend all of the Committee's available funding for the 1986 Colorado Senate race.

II

We next consider the Committee's constitutional challenges to the FECA. The Committee asserts that the monetary caps in § 441a(d)(3) violate its First Amendment guarantees of freedom of speech and association. The Committee focuses on the alleged absence of a compelling governmental interest served by the restrictions in § 441a(d)(3) and also asserts that the statute discriminates based upon content. The FEC's position is that *Buckley* and later cases endorse distinctions between independent expenditures and contributions, and that other FECA contribution ceilings have consistently been upheld as constitutional by the Supreme Court. We agree with the FEC that § 441a(d)(3) is a permissible burden on speech and association.

The primary purpose of the contribution and expenditure caps in the FECA are to prevent corruption or the appearance of corruption. *Buckley* 424 U.S. at 25-26. The FECA starts from the premise that political committees may make only minimal expenditures in connection with campaigns, § 441a(a) (dollar limits on contributions), then creates one exception at § 441a(d)(3) (coordinated expenditure limits for certain political committees made in connection with federal election campaigns). *DSCC*, 454 U.S. at 28-29 n.1; 11 C.F.R. § 110.7(b); *see also* 2 U.S.C. § 431(14)-(16). This exception allows for greater monetary support by political parties than would otherwise be permitted by § 441a(a). The coordinated expenditures permitted by § 441a(d)(3) are treated for purposes of reporting and monetary limitations as contributions from the political committee to the candidate, § 441a(7)(B)(i); *see also* § 434(b)(4)(H)(iv), and fall within the contribution ceilings contained in § 4.41a(a). *See Buckley*, 424 U.S. at 46; *FEC v.*

National Political Action Committee, 470 U.S. 480, 492 (1985) *(NCPAC)*.

The same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees.[11] The opportunity for abuse is greater when the contributions (or in the instant case, coordinated expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures. *See Buckley*, 424 U.S. at 26-27; *NCPAC*, 470 U.S. at 497. The Committee, stressing the benefits of party discipline and the broad interests of party success, argues that the dangers of domination of candidates by large individual donors do not apply to party expenditures. But party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures. The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties. This case is, therefore, ideally postured for deference to the congressional will.

The Supreme Court has endorsed the government's interest in curtailing large campaign contributions as legitimate. In

[11] We acknowledge that *Buckley* upheld then 18 U.S.C. § 608(f) as constitutional when challenged as discriminatory under the Fifth Amendment, and not the First Amendment, which is the basis for the Committee's constitutional challenge here. *Buckley*, 424 U.S. at 59 n.67. However, *MCFL* adopted much of the reasoning in *Buckley* in analyzing the First Amendment challenges to § 441b. We do not, therefore, discount the importance of *Buckley* in the context of our First Amendment analysis.

addition to preventing corruption or the appearance of corruption, these restrictions "equalize the relative ability of all citizens to affect the outcome of elections," *Buckley*, 424 U.S. at 26, and to a degree cap campaign costs and increase accessibility to our political system. *Id.* The Court has distinguished between restrictions on contributions and restrictions on independent expenditures and then invalidated spending restrictions while upholding contribution limits. *Id.* at 58-59.

By treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, "secur[ing] a political *quid pro quo* from current and potential office holders." *Id.* at 26-27. Contribution limits regulate the quantity of political speech, but do not foreclose speech or political association. We do not see this monetary cap as content based; it is rather a consequence of the funding source. We uphold as constitutional, against the Committee's First Amendment challenge, the spending limits in § 441a(d)(3).

We REVERSE and REMAND with instructions that the district court enter judgment in favor of the FEC, and for a determination under 2 U.S.C. § 437g(a)(6) of the appropriate civil penalty.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1159

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, et al.,

Defendants.

ORDER AND MEMORANDUM OF DECISION

This case involves alleged violations of the Federal Elections Campaign Act of 1971, as amended, 2 U.S.C.A. §§ 431-456 (West 1985) (the "Act"). Plaintiff Federal Election Commission sued Defendant Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones, claiming that defendants had failed to report a certain payment as an "expenditure," as required by 2 U.S.C.A. § 441a(d)(3). Plaintiff seeks declaratory, civil, and injunctive relief under the Act. The matter comes before the court on (1) "Defendants' Motion for Summary Judgment" filed May 15, 1990, and (2) "Plaintiffs Motion for Summary Judgment" filed July 6, 1990. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1976).

FACTS

Defendant Colorado Republican Federal Campaign Committee (the "Committee") is an unincorporated political association. It works to advance the goals and values of the Republican Party in the State of Colorado. (Defs.' Statement of

Undisputed Facts and Supp. Exs. ¶ 1 [filed May 15, 1990] [hereinafter "Defs.' Statement"], *admitted at* Pl. Fed. Election Comm'n's Resp. to Defs.' Statement of Undisputed Facts and Supp. Exs. ¶ 1 [filed July 6, 1990] [hereinafter "Pl.'s Resp. to Defs.' Statement"].) It is the federally-registered committee for the Republican Party in Colorado and is therefore (as it acknowledges) subject to the Act.

Section 441a(d)(3) of the Act limits the amount which such a committee may expend "in connection with the general election campaign of a candidate for federal office." 2 U.S.C.A. § 441a(d)(3). In 1986, the Committee assigned its yearly right to make expenditures under the Act to the National Republican Senatorial Committee. (Defs.' Statement ¶ 16, Ex. 4 [Defs' Resp. to Pl.'s Req. for Admis.], *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 15-16.) The Committee thereafter paid $15,000 for a radio advertisement, entitled "Wirth Facts #1" [hereinafter "the Advertisement"], the text of which follows:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

(Defs.' Statement ¶ 7, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee devised "Wirth Facts #1" as a response to a series of television advertisements featuring then-Congressman Wirth. These advertisements were sponsored by the Committee for Tim Wirth, Inc. (Pl. Fed. Election Comm'n's Mem. of

P. & A. in Supp. of Pl.'s Mot. for Summ. J. and in Opp'n to Defs.' Summ. J. Mot. at 6 [filed July 6, 1990] [hereinafter "Pl.'s Mot."].) The Advertisement ran between April 4 and 13, 1986, four months before the August Democratic primary and seven months before the November general election. (Defs.' Statement ¶¶ 4-6, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee is required by section 434(b)(4)(H)(iv) to make quarterly or monthly reports which must contain any section 441(b)(3) expenditures. *See* 2 U.S.C.A. § 434(a)(4)(A)(i). In the Committee's quarterly report, it listed the $15,000 paid for the Advertisement as an operating expense—not as a section 441a(d)(3) expenditure—and identified it as "voter information to Colorado voters—advertising." (Defs.' Statement, Ex. 12 at 3 [Defs.' Br. for Fed. Election Comm'n Proceedings].) On June 12, 1986, the Colorado Democratic Party filed an administrative complaint with the Federal Election Commission ("Commission"), alleging, inter alia, that defendants' expenditure for the Advertisement violated the Act. On January 10, 1989, the Commission determined there was probable cause to believe defendants had violated sections 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f) of the Act. When settlement negotiations failed, the Commission instituted this civil action.

The parties filed cross-motions for summary judgment on plaintiff's claim that defendants failed to comply with the Act. Defendants maintain section 441a(d)(3) does not apply to the money paid for the Advertisement because it was not an expenditure "in connection with" the general election of a candidate for federal office. (Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J. at 6-7 [filed May 15, 1990] [hereinafter "Defs.' Mot."].) Defendants also assert a counterclaim alleging that section 441a(d)(3) is unconstitutional. No material facts are in dispute. Because I find that plaintiff has failed to demonstrate the Advertisement was "in connection with" the general election of a candidate for federal office, I grant defendants' motion

for summary judgment and deny plaintiffs motion. I therefore need not, and do not, reach defendants' challenge to section 441a(d)(3)'s constitutionality.

ANALYSIS

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted where there is "no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S. Ct. 2548, 2552 (1986). In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id.*, 477 U.S. at 321, 106 S. Ct. at 2552. Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. A triable issue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson*, 477 U.S. at 250, 106 S. Ct. 2511.

Section 441a(d)(3)of the Act is at the center of this dispute. It provides:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure *in connection with the general election campaign of a candidate for Federal office* in

a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator . . . , the greater of—

(i) 2 cents multiplied by the voting age population of the State . . . ; or

(ii) $20,000 . . .

2 U.S.C.A. § 441a(d)(3) (emphasis added). Because the Committee assigned the full amount of expenditures permitted by section 441a(d)(3) to the National Republican Senatorial Committee, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39-40, 102 S. Ct. 38, 46 (1981) [hereinafter *DSCC*], it no longer had the right to make section 441a(d)(3) expenditures. As a consequence, the Committee's expenditure of $15,000 for the Advertisement, if made "in connection with" the general election campaign, was a violation of the spending limits established by section 441a(d)(3).

Two types of expenditures are regulated under the Act: coordinated and independent. A coordinated expenditure is one made in cooperation with, or with the consent of, a candidate, his agents, or an authorized committee of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47 n.53, 96 S. Ct. 612, 647 n.53 (1976). An independent expenditure is one made without the knowledge or permission of a candidate, his agent, or his campaign committee. *Id. See* 2 U.S.C.A. § 431(17). Coordinated expenditures are considered "contributions" under section 441a(a)(7)(B)(i); as such, they may be more freely limited than independent expenditures. *Buckley*, 424 U.S. at 48, 96 S. Ct. at 647-48; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 105 S. Ct. 1459, 1466 (1985) [hereinafter *NCPAC*]. In *Buckley*, the Court upheld as constitutional the limitations on contributions to candidates and struck down as unconstitutional limitations on independent expenditures. *NCPAC*, 470 U.S. at 491, 105 S. Ct.

at 1465. *See also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260, 107 S. Ct. 616, 630 (1986) [hereinafter *MCFL*] ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 194, 196-97, 101 S. Ct. 2712, 2720, 2724-25 (1981) (same).

Expenditures by party committees are considered to be coordinated expenditures subject to the monetary limits of section 441a(d). *DSCC*, 454 U.S. at 27 n.1, 102 S. Ct. at 40 n.1.[1] Party committees have been deemed incapable of making independent expenditures in connection with the campaigns of their party's candidates. *DSCC*, 454 U.S. at 27 n.1, 102 S. Ct. at 40 n.1. *See also* FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985); FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984).

The Commission has the "primary and substantial responsibility for administering and enforcing the Act," and has "extensive rulemaking and adjudicative powers." Buckley, 424 U.S. at 109-10, 96 S. Ct. at 677-78. When interpreting the Act, the Commission's interpretation is presumptively entitled to deference. *DSCC*, 454 U.S. at 38, 102 S. Ct. at 45. The Commission has, by regulation, forbidden independent expenditures by national and state party committees. *See* 11 C.F.R. § 110.7(B)(4) (1981).

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[1] Defendants point to a passage in *Buckley* which classifies 2 U.S.C.A. § 608(f) (West 1970) (recodified as section 441a[d]) as an "expenditure ceiling," as opposed to a contribution limitation. According to defendants, this reference suggests the Court considered section 441a(d) to regulate independent expenditures. It is unclear how referring to section 441a(d) as an "expenditure" limitation necessarily suggests the section regulates *independent* expenditures. In light of the Court and Commission's other pronouncements, and the fact that this reference is dicta, *see Buckley*, 424 U.S. at 58 n.66-67, 96 S. Ct. at 653 n.66-67, I do not find this singular reference persuasive.

Defendants suggest that because no Republican candidate had been nominated, the expenditure was necessarily "independent," not "coordinated." However, for purposes of determining whether an expenditure is coordinated or independent it is irrelevant whether a candidate has been nominated at the time the expenditure is made. *See* FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984). "[N]othing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." *Id.* Organizations whose major purpose is the nomination or election of a candidate "are, by definition, campaign related," *Buckley*, 424 U.S. at 80, 96 S. Ct. at 663, regardless of whether a specific candidate has been nominated. Based on Supreme Court precedent and the Commission's interpretation of the statute, I find that the Committee's expenditure was coordinated. It was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated.

The Committee's expenditure would nevertheless not be subject to section 441a(d)(3) limitations unless the expenditure was made "in connection with" the general election campaign of a candidate for federal office. No controlling or persuasive authority has interpreted the phrase "in connection with" in the context of section 441a(d)(3). The Court, however, has interpreted the phrase "in connection with" in the context of section 441b, which, like section 441a(d)(3), regulates contributions and expenditures. In *MCFL*, the Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249, 107 S. Ct. at 623. *See also Buckley*, 4:.4 U.S. at 80, 96 S. Ct. at 663. "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S. Ct. 2499, 2504 (1990); *Sorenson v. Secretary of Treasury of the United States*, 475 U.S. 851, 860,

106 S. Ct. 1600, 1606 (1986):; *Bamson v. United States*, 81,6 F.2d 549 (10th Cir.), cert. denied, 484 U.S. 896, 108 S. Ct. 229 (1987) (when the same words are used in different sections of the same law, they will be given the same meaning).

This rule of statutory construction is usually followed where different parts of the same act have a similar purpose, as do sections 441a(d)(3) and 441b. Both sections 441a(d)(3) and 441b are intended to regulate contributions and expenditures of multi-person organizations. While section 441a(d) regulates expenditures by national committees, state committees, or subordinate committees of the state committees, section 441b regulates expenditures by national banks, corporations, or labor organizations. Since I examine the statute as a whole, I find the Court's interpretation of "in connection with" in the context of section 441b to be persuasive of my interpretation of the same words in section 441a(d)(3).

Plaintiff urges the court to adopt the Commission's interpretation of "in connection with" which would require the Advertisement to contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985). According to plaintiff, section 441b differs significantly from section 441a(d)(3), in that 441b regulates independent expenditures, whereas section 441a(d)(3) regulates coordinated expenditures. Although Buckley acknowledges that coordinated expenditures may be more freely regulated than independent expenditures, it does not follow that the identical words, when used with reference to coordinated expenditures, should be given a more expansive interpretation.

The Supreme Court's decision in *Buckley* suggests just the opposite. When examining the intrusiveness of the statute's regulations on first amendment freedoms, the Court found that a limitation on coordinated expenditures was justified in order to stem "the reality or appearance of corruption in the electoral process." *Buckley*, 424 U.S. at 46, 96 S. Ct. at 647-48.

Although the Court found the justification for regulating coordinated expenditures outweighed the infringement on the First Amendment, this conclusion does not create a carte blanc for expansive regulation of coordinated expenditures. On the contrary, the fact that section 441a(d)(3) implicates first amendment freedoms argues for adoption of the more narrowly defined "express advocacy" interpretation in order to minimize intrusions.[2] Moreover, as *Buckley* notes, the limitation on contributions by state: political committees, "[r]ather than undermining freedom of association, . . . enhances the opportunity of bona fide groups to participate in the election process." *Buckley*, 424 U.S. at 33, 96 S. Ct. at 642. Given that the effect of the regulation is to enhance the political freedom of committees, I find that the "express advocacy" standard, which is a less intrusive limitation on a committee's freedom, is consistent with the Act's purpose. I do not find any compelling justification within the Commission's advisory opinion, nor in plaintiff's argument, for expanding *Buckley*'s carefully circumscribed exception to its prohibition against regulation of freedom of speech.

The Commission does not point to any other section of the statute where the courts have given the language "in connection with" the expansive interpretation the Commission advocates in this case. In fact, the courts have consistently interpreted "in connection with" as requiring "express advocacy." *See Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S. Ct. 151

[2] A narrow interpretation of the words "in connection with" also addresses the constitutional concerns raised by defendants. Defendants contend that if all expenditures by state committees were deemed contributions subject to section 441a(d)(3), then they would not be free to speak in favor of their candidates. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Reply to Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 4 [filed July 25, 1990] [hereinafter "Defs.' Reply"].) By adopting a more narrowly defined interpretation of "in connection with," state political committees remain free to engage in speech which does not expressly advocate the election of its candidates.

(1987); *Federal Election Comm'n v. Central Long Island Tax Reform*, 616 F.2d 45, 53 (2nd Cir. 1980).[3] In *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), the Commission itself advocated the adoption of the "express advocacy" interpretation of "in connection with" in the context of section 441b(a). In adopting the Commission's interpretation, the D.C. Circuit noted:

> [T]he FEC's interpretation is consistent with *Buckley*, in which the Supreme Court held that under the first amendment, the phrases "for the purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable candidate," a definition that was subsequently incorporated into the Act. *See* 2 U.S.C. § 431(17). To be sure, the Court limited these definitions to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions, *see Buckley*, 424 U.S. at 78-80, 96 S. Ct. at 663-64. Nonetheless the fact that the Court in *Buckley* formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical,

[3] In *United States v. International Union UAW-CIO*, 352 U.S. 567, 587, 77 S. Ct. 529, 550 (1957), the Court interpreted "in connection with" in the context of a predecessor to the current Act, which prohibited corporate or union contributions or expenditures to be used "in connection with" any election for federal office. *Id.*, 352 U.S. at 568, 77 S. Ct. at 530. The Court held that the "in connection with" found in the statute was understood to proscribe "the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party." *Id.*, 352 U.S. at 587, 77 S. Ct. at 550. It is unclear from this language whether the Court was adopting a different interpretation of "in connection with" or merely applying the "express advocacy" standard. Plaintiff does not explain how this language differs materially from the "express advocacy" standard. Since no court has subsequently adopted the language used in *International Union UAW-CIO*, I decline to do so in this case.

> reasonable, and consistent with the overall statutory framework. *The fact that the FEC adopted this interpretation for all relevant statutory provisions, even where not constitutionally required, only adds to its reasonableness for it enhances the consistency and evenhandedness with which the FEC ultimately administers the Act.*

Orloski, 795 F.2d at 166-67 (emphasis added). *See also* FEC Advisory Opinion 1978-46, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5348 (Oct. 5, 1978) (suggesting that section 441a(d) requires "express advocacy").

The "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *NCPAC*, 454 U.S. at 35, 102 S. Ct. at 44; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5, 98 S. Ct. 566, 573 n.5 (1978). I do not find the Commission's suggested interpretation of "in connection with" to be entitled to deference where it is neither thorough nor consistent with either its own previous rulings or the courts' holdings. I conclude that "express advocacy" is required in order for a coordinated expenditure to be "in connection with" the general election campaign of a candidate for federal office under section 44la(d)(3).

Having made this determination, I must decide whether the Advertisement constituted "express advocacy." The Court has adopted a bright-line test for identifying speech which constitutes "express advocacy," recognizing that:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42, 96 S. Ct. at 645. *See Furgatch*, 807 F.2d at 860; *Federal Election Comm'n v. National Organization for Women*, 713 F. Supp. 428, 432 (D.D.C. 1989). The Court defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.' " *Buckley*, 424 U.S. at 46 n-52, 96 S. Ct. at 647 n-52. Speech is "advocacy" if it "presents a clear plea for specific action, and . . . it must be clear what action is advocated." *Furgatch*, 807 F.2d at 864. Speech which is merely informative would not be considered "advocacy." *Id.* When determining whether speech constitutes "express advocacy," the focus is on the actual wording used. *Buckley*, 424 U.S. at 42, 96 S. Ct. at 646.

The Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action. The Advertisement concludes with "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the Advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch*.

According to plaintiff, the surrounding circumstances suggest the Advertisement was, in fact, a plea for action. The Advertisement identified Wirth by name and position, referred to his senate candidacy, responded to Wirth's own campaign advertisements, and said "paid for by the Colorado Republican State Central Committee." (Pl.'s Mot. at 15.) At the time the Advertisement ran, plaintiff maintains, Wirth was the only credible announced Democratic candidate for Senate. *Id.* In addition, the public "knew" the sponsor of the Advertisement, *i.e.*, the Republican party, would eventually nominate a candidate. Thus, the Advertisement implicitly urged the public both to vote against Wirth and to support whomever the Republican candidate would be. Plaintiff also points to contemporaneous press statements of Howard "Bo" Callaway, then Chairman of the

Colorado Republican Party, concerning the state committee's general purpose which allegedly leave "no doubt that the intent of the ad was to attack Mr. Wirth's candidacy for the Senate." (Pl.'s Mot. at 10-11, 17-18.)

I do not believe this type of indirect urging constitutes "express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation. *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471 (1st Cir. 1991). In adopting a bright-line approach, the Court noted the difficulty in interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43, 96 S. Ct. at 646 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S. Ct. 315, 325 [1945]). In adopting the "express advocacy" standard, the Court sought to protect issue advocacy. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential. . . . Discussion of public issues and debate on the: qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14-15, 96 S.

Ct. at 632. Trying to determine whether the surrounding circumstances, coupled with the implications of the Advertisement, constitute "express advocacy" leads to the type of semantic dilemma which the Court sought to avoid by adopting a bright-line rule. I decline to blur *Buckley*'s bright-line rule by interpreting the Advertisement's criticism of Wirth as "express advocacy." Viewing the facts in the light most favorable to plaintiff, I find that the Advertisement does not call for the type of "express advocacy" required by *Buckley*. Because I conclude that no reasonable trier of fact could find for plaintiff on the basis of the evidence presented, defendants are entitled to summary judgment as a matter of law. *Masushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

With regard to plaintiff's motion for summary judgment, the analysis of whether the Advertisement constitutes "express advocacy" is the same. Defendants allege that the Advertisement neither contains a direct plea for action, nor conveys support for a particular candidate. According to defendants, the Advertisement simply informed the public about the political record of an incumbent Colorado congressman; it did not advocate voting for or against any political candidate. (Defs.' Mot. at 7.) In addition, the Advertisement was broadcast seven months before the general election—before either party had chosen its candidate. (Defs.' Reply at 10.) Defendants claim Wirth's senate candidacy was referenced in the Advertisement only for the purpose of identifying his statements. (Defs.' Reply at 9.) Plaintiff fails to adequately rebut these claims. Accordingly, plaintiffs motion for summary judgment is denied.

Conclusion

Because I find that the expenditure for the Advertisement was not "in connection with" the general election of a candidate for federal office, it was not subject to section 44la(d)(3) limitations and did not violate the Act. Since I am able to resolve the dispute on statutory grounds, I do not reach defendants'

challenge to the constitutionality of section 44la(d)(3). Defendants cannot avoid this result by posturing the constitutional issue as an independent counterclaim. It is therefore

ORDERED as follows:

(1) Plaintiffs motion for summary judgment is DENIED; and

(2) Defendants' motion for summary judgment is GRANTED. All claims against defendants are dismissed. Defendants' counterclaim is DISMISSED as moot.

Dated this 30th day of August, 1993.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1159

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on August 30, 1993, was mailed to the following on August 30, 1993:

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JAMES R. MANSPEAKER,
CLERK

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 89-N-1159

FEDERAL ELECTION COMMISSION,
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200,

Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

and

DOUGLAS L. JONES, AS TREASURER,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

Defendants.

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

JURISDICTION

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted the Federal Election Commission ("Commission" or "FEC") by provisions of the Federal Election Campaign Act of 1971, as amended ("Act") or "FECA"), codified at 2 U.S.C.

§§ 437d(a)(6) and 437g(a)(6)(A). This court has original jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency of the United States expressly authorized to sue by an act of Congress.

VENUE

2. Venue is properly found in the District of Colorado, in accord with 2 U.S.C. § 437g(a)(6)(A), as the defendants can be found, reside or transact business in this district.

THE PARTIES

3. Plaintiff Federal Election Commission is the agency of the United States government empowered with exclusive and primary jurisdiction with respect to the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The FEC is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437g(a)(6).

4. Defendant Colorado Republican Federal Campaign Committee ("State Party") is a political committee within the meaning of 2 U.S.C. § 431(4) and is the federal account of the Colorado Republican State Central Committee. *See* 11 C.F.R. § 102.5(b)(1)(i). Hence the State Party is a party committee which represents a political party on the state level. *See* 11 C.F.R. § 100.5(e)(4).

5. Defendant Douglas L. Jones is the treasurer of the Colorado Republican Federal Campaign Committee. *See* 2 U.S.C. §§ 432(a), 432(c), and 434(a)(1).

STATUTES

6. 2 U.S.C. § 441a(d)(3)(A) states, *inter alia*, that a State committee of a political party may not make any expenditure in connection with the general election campaign of a candidate

for the United States Senate in that State who is affiliated with such party which exceeds the greater of 2 cents multiplied by the voting age population of the State or $20,000.

7. 2 U.S.C. § 434(b)(4)(H)(iv) states that political committees must report to the Commission, for the reporting period and the calendar year, the total amount of expenditures made under 2 U.S.C. § 441a(d).

8. 2 U.S.C. § 434(b)(6)(B)(iv) states that political committees (other than the authorized committees of candidates) must report to the Commission the name and address of each person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of any such expenditure as well as the name of, and the office sought by, the candidate on whose behalf the expenditure is made.

9. 2 U.S.C. § 441a(f) states, *inter alia*, that no political committee shall knowingly make any expenditure in violation of 2 U.S.C. § 441a, and no officer or employee of a political committee shall knowingly make any expenditure on behalf of a candidate in violation of any limitation imposed on contributions and expenditures under 2 U.S.C. § 441a.

ADMINISTRATIVE PROCEEDINGS

10. On June 12, 1986, M. Buie Seawell filed an administrative complaint on behalf of the Colorado State Democratic Party against the State Party and its treasurer. On June 19, 1986, the Commission notified the State party and its treasurer that a complaint had been field against them. Acting upon the basis of information ascertained from the complaint and the response made thereto, the Commission, by the affirmative vote of at least four of its members, found reason to believe on November 5, 1986, that the State Party and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). The basis of this finding was that it appeared that the State Party

and its treasurer had made a disbursement for a radio advertisement that appeared to be an expenditure in connection with the general election for United States Senator from Colorado in 1986, and thus said expenditure appeared to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A); the State Party and its treasurer, however, had not reported these expenditures in accordance with 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). An investigation was initiated.

11. By letter dated November 13, 1986, the State Party and its treasurer were notified of the Commission's reason to believe findings of November 5, 1986.

12. The Commission's General Counsel notified the State Party and its treasurer by letter dated November 10, 1987, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that they had violated the Act, and provided them with a brief stating the position of the General Counsel on the legal and factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). The State Party and its treasurer were provided an opportunity to respond.

13. On June 14, 1988, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that the State Party and its Treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

14. By letter dated June 23, 1988, the State Party and its treasurer were notified of the Commission's probable cause to believe findings of June 14, 1988, and a proposed conciliation agreement directed to the State Party and its treasurer was enclosed.

15. The Commission's General Counsel notified Douglas L. Jones by letter dated September 28, 1988, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that Douglas L. Jones, as treasurer of the State Party, had violated the Act, and provided him with a brief stating the position of the General Counsel in the legal and

factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). Douglas L. Jones, as treasurer, was provided an opportunity to respond.

16. On January 10, 1989, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that Douglas L. Jones, as treasurer of the State Party, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

17. By letter dated January 17, 1989, the State Party and Douglas L. Jones, as treasurer, were notified of the Commission's probable cause to believe findings of January 10, 1989, and a proposed conciliation agreement directed to the State Party and Douglas L. Jones, as treasurer, was enclosed.

18. The Commission endeavored for a period of not less than thirty (30) days to correct the violation by informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with the defendants in accordance with 2 U.S.C. § 437g(a)(4)(A).

19. On April 7, 1989, after failing to reach an agreement with the State Party and Douglas L. Jones, as treasurer, the Commission, by the affirmative vote of at least four of its members, authorized, pursuant to 2 U.S.C. § 437g(a)(6)(A), the filing of a civil suit against the defendants in the United States District Court.

20. Thereafter, the defendants were notified by letter dated April 10, 1989, of the Commission's authorization of the instant civil action.

21. The Commission has met all of the jurisdictional prerequisites for filing this suit.

STATEMENT OF CLAIM

COUNT 1

22. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 21, inclusive.

23. Defendants were prohibited by 2 U.S.C. § 441a(d)(3)(A), from making expenditures in connection with the 1986 general election campaign of a candidate for United States Senator from Colorado in excess of an amount equal to 2 cents multiplied by the voting age population of the State, which amount was $103,248.

24. Defendants assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee.

25. On April 2, 1986, defendants made an expenditure of $15,000 to pay for a radio advertisement, known as "Wirth Facts 1." The text of this advertisement was as follows:

> "Paid for by the Colorado Republican State Central Committee.
>
> "Here in Colorado we're use [sic] to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

26. "Wirth Facts #1" was aired during the period between April 2, 1986 and August 12, 1986. During that period, Tim Wirth was a member of the United States House of Representatives and a Democratic candidate for the United States Senate. He had no opposition for the Democratic party nomination for the United States Senate in the primary held August 12, 1986. In that primary, he was nominated by the Democratic party for

the office of United States Senator, and ran in the general election as the opponent of the Republican party candidate for United States Senator.

27. Defendants' expenditure of $15,000 to pay for the radio advertisement known as "Wirth Facts #1" was made in connection with the 1986 general election for the United States Senate in Colorado.

28. Defendants' expenditures of $15,000 to pay for "Wirth Facts #1" was an expenditure made by the State committee of a political party that was subject to 2 U.S.C. § 441a(d).

29. Defendants did not report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) as required by 2 U.S.C. § 434(b)(4)(H)(iv).

30. Defendants' failure to report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) violated 2 U.S.C. § 434(b)(4)(H)(iv).

COUNT 2

31. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

32. Defendants were required by 2 U.S.C. § 434(b)(6)(B)(iv) to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

33. Defendants did not report to the Commission, with respect to their expenditure for "Wirth Facts #1," the name and address of each person who received said expenditure from

the State Party, the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

34. Defendants' failure to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made, violated 2 U.S.C. § 434(b)(6)(B)(iv).

COUNT 3

35. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

36. Defendants' expenditure of $15,000 in connection with the 1986 general election for U.S. Senator from Colorado pursuant to 2 U.S.C. § 441a(d) was in excess of the limitation on the amount of such contributions set forth at 2 U.S.C. § 441a(d)(3)(A)(i), in that defendants had assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee, and therefore defendants could not longer make such expenditures.

37. Defendants violated 2 U.S.C. § 441a(f) by making an expenditure in excess of the limitation set forth at 2 U.S.C. § 441a(d)(3)(A)(i).

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission prays that this Court:

(1) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as

treasurer, violated 2 U.S.C. § 434(b)(4)(H)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(2) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(3) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 441a(f) by making an expenditure in connection with a general election campaign for federal office in excess of a limitation set forth at 2 U.S.C. § 441a.

(4) Assess against defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, a civil penalty of the greater of five thousand dollars ($5000) or an amount equal to 100 percent of the amounts involved in each of the violations committed, pursuant to 2 U.S.C. § 437g(a)(6)(B), for which defendants shall be jointly and severally liable;

(5) Permanently enjoin each defendant from similar future violations of the Federal Election Campaign Act of 1971, as amended; and

(6) Award the plaintiff Federal Election Commission such other and further relief as the Court deems appropriate.

Respectfully submitted,

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

Ivan Rivera
Assistant General Counsel

Charles W. Snyder
Attorney

July 5, 1989

FOR THE PLAINTIFF
FEDERAL ELECTION
COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

APPENDIX E

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

April 10, 1989

Jan W. Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 2186
Colorado Republican Federal
Campaign Committee and
Douglas L. Jones, as treasurer

Dear Mr. Baran:

You were previously notified that on January 17, 1989, the Federal Election Commission found probable cause to believe that Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with the above-captioned matter. This determination followed the Commission's June 14, 1988, finding of probable cause to believe that the Colorado Republican Federal Campaign Committee violated these sections of the Act.

As a result of our inability to settle this matter through conciliation within the allowable time period, the Commission has authorized the General Counsel to institute a civil action for relief in the United States District Court.

Should you have any questions, or should you wish to settle this matter prior to suit, please contact Ivan Rivera, Assistant

General Counsel, at (202) 376-8200, within five days of your receipt of this letter.

Sincerely,

Lawrence M. Noble
General Counsel

APPENDIX F

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

January 17, 1989

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal
Campaign Committee and
Douglas L. Jones, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d). Additionally, on September 12, 1988, the Commission denied your Motion for Reconsideration of Probable Cause.

On September 29, 1988, based upon the fact that your clients had changed its treasurer prior to the Commission's probable cause determination, the Office of the General Counsel provided you with a supplemental brief regarding the General Counsel's intention to recommend to the Commission that there is probable cause to believe the current treasurer violated the above-noted sections of the Act.

On January 10, 1989, the Commission found that there is probable cause to believe Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within 10 days. I will then recommend that the Commission approve the agreement. Please make your check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	
Colorado Federal Campaign Committee and Douglas L. Jones as treasurer	MUR 2186

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint by M. Buie Seawell on behalf of the Colorado State Democratic Party. An investigation was conducted, and the Federal Election Commission ("the Commission") found probable cause to believe that the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, ("Respondents") violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

NOW, THEREFORE, the Commission and the Respondents, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents, and the subject matter of this proceedings.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Respondent, the Colorado Republican Federal Campaign Committee, is a political committee within the meaning of 2 U.S.C. § 431(4), and is the federal account of the Colorado Republican State Central Committee.

2. Respondent, Douglas L. Jones, is the treasurer of the Colorado Federal Campaign Committee.

3. Respondents assigned their ability to make coordinated party expenditures to the National Republican Senatorial Committee ("NRSC") on January 10, 1986.

4. Respondents' assignment precluded them from making any section 441a(d) expenditures, however, in April 1986, Respondents aired a radio ad entitled Wirth Facts #1 that contained the statement "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts," that was a section 441a(d) expenditure. The cost of this Ad was $14,549.23.

5. Respondents' reports on file with the Commission failed to report any expenditures made pursuant to section 441a(d).

6. Pursuant to 2 U.S.C. § 441a(d)(3)(A)(i), the National Committee of a political party, or a state committee of a political party, including any subordinate committee of a state committee, may not make any expenditures in connection with the general election campaign of a candidate for federal office in a state who is affiliated with such party, which exceeds in the case of a candidate for election for the Office of Senator, 2 cents multiplied by the voting age population of that state. The 1986 limitation for the Colorado Senate general election was $103,248.54.

7. Pursuant to 2 U.S.C. § 441a(f), political committees are prohibited from making expenditures exceeding the Act's limitations.

8. Pursuant to 2 U.S.C. § 434(b)(4)(H)(iv), political committees are required to report the total amount of all disbursements made under section 441a(d).

9. Pursuant to 2 U.S.C. § 434(b)(6)(B)(iv), political committees are required to report the name and address of each person who receives any expenditure from such committee in connection with an expenditure under section 441a(d), together with the date, amount and purpose of

the expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made.

V. 1. Respondents assigned to the NRSC its entire section 441a(d) limit, and were precluded from making any expenditures under this section. Respondents then made a section 441a(d) expenditure in violation of 2 U.S.C. § 441a(f).

2. Respondents failed to report the total amount of their section 441a(d) expenditures in violation of 2 U.S.C. 434(b)(4)(H)(iv) .

3. Respondents failed to itemize their section 441a(d) expenditures in violation of 2 U.S.C. § 434(b)(6)(B)(iv).

VI. 1. Respondents will amend their reports to comply with the Act's above-noted reporting requirements.

2. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Four Thousand dollars ($4,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no

other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

_____ _____

Lawrence M. Noble
General Counsel

Date

FOR THE RESPONDENTS:

_____ _____

Douglas L. Jones, Treasurer
Colorado Republican Federal
Campaign Committee

Date

APPENDIX G

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 23, 1988

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probably cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within 10 days. I

will then recommend that the Commission approve the agreement. Please make your check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Colorado Federal Campaign Committee and Vincent Zarlengo, as treasurer	MUR 2186

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint by M. Buie Seawell on behalf of the Colorado State Democratic Party. An investigation was conducted, and the Federal Election Commission ("the Commission") found probable cause to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, ("Respondents") violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

NOW, THEREFORE, the Commission and the Respondents, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents, and the subject matter of this proceeding.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Respondent, the Colorado Republican Federal Campaign Committee, is a political committee within the meaning of 2 U.S.C. § 431(4), and is the federal account of the Colorado Republican State Central Committee.

2. Respondent, Vincent Zarlengo, is the treasurer of the Colorado Federal Campaign Committee.

3. Respondents assigned their ability to make coordinated party expenditures to the National Republican Senatorial Committee ("NRSC") on January 10, 1986.

4. Respondents' assignment precluded them from making any section 441a(d) expenditures, however, in April 1986, Respondents aired a radio ad entitled Wirth Facts #1 that contained the statement "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts," that was a section 441a(d) expenditure. The cost of this Ad was $14,549.23.

5. Respondents' reports on file with the Commission failed to report any expenditures made pursuant to section 441a(d).

6. Pursuant to 2 U.S.C. § 441a(d)(3)(A)(i), the National Committee of a political party, or a state committee of a political party, including any subordinate committee of a state committee, may not make any expenditures in connection with the general election campaign of a candidate for federal office in a state who is affiliated with such party, which exceeds in the case of a candidate for election for the Office of Senator, 2 cents multiplied by the voting age population of that state. The 1986 limitation for the Colorado Senate general election was $103,248.54.

7. Pursuant to 2 U.S.C. § 441a(f), political committees are prohibited from making expenditures exceeding the Act's limitations.

8. Pursuant to 2 U.S.C. § 434(b)(4)(H)(iv), political committees are required to report the total amount of all disbursements made under section 441a(d).

9. Pursuant to 2 U.S.C. § 434(b)(6)(B)(iv), political committees are required to report the name and address of each person who receives any expenditure from such

committee in connection with an expenditure under section 441a(d), together with the date, amount and purpose of the expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made.

V. 1. Respondents assigned to the NRSC its entire section 441a(d) limit, and were precluded from making any expenditures under this section. Respondents then made a section 441a(d) expenditure in violation of 2 U.S.C. § 441a(f).

2. Respondents failed to report the total amount of their section 441a(d) expenditures in violation of 2 U.S.C. 434(b)(4)(H)(iv).

3. Respondents failed to itemize their section 441a(d) expenditures in violation of 2 U.S.C. S 434(b)(6)(B)(iv).

VI. 1. Respondents will amend their reports to comply with the Act's above-noted reporting requirements.

2. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Four Thousand dollars ($4,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this agreement becomes effective to

comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

_____ _____

Lawrence M. Noble Date
General Counsel

FOR THE RESPONDENTS:

_____ _____

Vincent Zarlengo, treasurer Date
Colorado Republican Federal
Campaign Committee

APPENDIX H

FEDERAL ELECTION COMMISSION
Washington D.C. 20463

November 10, 1987

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 2186
Colorado Federal Campaign
Committee and
Vincent Zarlengo, as
treasurer

Dear Mr. Baran:

Based on a complaint filed with the Federal Election Commission on June 12, 1986, and information supplied by your clients, the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, the Commission, on November 5, 1986, found that there was reason to believe your clients violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Additionally, on June 9, 1987, the Commission found reason to believe your clients violated 2 U.S.C. § 441a(d)(d)(A). The Commission instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred. Please note that the General Counsel's recommendation for probable cause to believe regarding excessive section 441a(d) spending cites to both 2 U.S.C. §§ 441a(f) and 441(d).

The Commission may or may not approve the General Counsel's recommendations. Submitted for your review is a brief stating the position of the General Counsel on the legal and

factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (10 copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request to the Commission for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Patty Reilly, the attorney assigned to handle this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Brief

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	
Colorado Federal Campaign Committee and Vincent Zarlengo, as treasurer	MUR 2186

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter arose from a complaint filed by M. Buie Seawell on behalf of the Colorado State Democratic Party. The complaint alleged the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, ("State Party") failed to report expenditures made for the purpose of influencing the 1986 general election. Specifically, the complaint noted four communications paid for by the State Party that negatively portrayed 1986 Democratic Senatorial Candidate Tim Wirth. Because these communications were said to be designed to influence voters to cast their ballots against Tim Wirth, the complaint alleged these communications were subject to the limitations of section 441a(d), and thus were required to be reported as section 441a(d) expenditures.

On November 5, 1986, the Commission found reason to believe the State Party and its treasurer violated §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) by failing to allocate and itemize one of these communications[1] as a section 441a(d) expenditure. Additionally, based on information received in the course of the investigation, on June 2, 1987, the Commission found reason to believe the State Party exceeded

[1] The Commission's reason to believe notification referred to this Ad as the "Defense Radio Ad." The State Party's response to the Commission's Interrogatories reveals the Ad was entitled "Wirth Facts #1." This latter designation is used for the purposes of this brief.

the limitations of section 441a(d)(3)(A).[2] This latter determination recognized that the State Party had assigned its ability to make coordinated party expenditures to the National Republican Senatorial Committee ("NRSC"), and that the NRSC had made such expenditures on the State Party's behalf up to the limitation of section 441a(d). Accordingly, the State Party's expenditure for Wirth Facts #1, made at a time when it was without an applicable section 441a(d) coordinated party limitation, constitutes an excessive expenditure.

II. ANALYSIS

A. The Facts

It is undisputed that on April 2, 1986, the State Party made an expenditure of $15,000 to the Colorado Media Group, Inc. for a radio production entitled "Wirth Facts #1.[3] The text of this Ad was as follows:

> Paid for by the Colorado Republican State Central Committee.
>
> Here in Colorado we're use [sic] to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon

[2] The Commission found reason to believe Respondents violated 2 U.S.C. § 441a(d)(3)(A). This section establishes limits for coordinated party expenditures, while section 441a(f) prohibits political committees from making expenditures exceeding the Act's limitations. Accordingly, the General Counsel's probable cause recommendation is that the State Party made coordinated party expenditures at a time when it lacked the ability to make such expenditures, in violation of both 2 U.S.C. §§ 441a(f) and 441a(d).

[3] Because the State Party overpaid for the Ad, on April 25, 1986, the vendor provided it with a $400.77 refund.

system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

The Ad aired over numerous Colorado radio stations prior to the August 12, 1986, primary election and followed the State Party's previously noted assignment of its section 441a(d) limitation to the NRSC.[4] To date, the State Party has never reported any section 441a(d) expenditures. As discussed below, the Ad constitutes an expenditure subject to the limitation of 2 U.S.C. § 441a(d).

B. The Law

Purusant to 2 U.S.C. § 441a(d)(3)(A)(i), the national committee of a political party, or a state committee of a political party, including any subordinate committee of a state committee, may not make any expenditures in connection with the general election campaign of a candidate for federal office in a state who is affiliated with such party which exceeds, in the case of a candidate for election to the Office of Senator, 2 cents multiplied by the voting age population of that state. The 1986 limit for the Colorado Senatorial race was $103,248. Political committees are prohibited from making expenditures exceeding the Act's limitations. 2 U.S.C. § 441a(f). The Act further requires political committees to report the total amount of all disbursements made under section 441a(d). 2 U.S.C. §434(b)(4)(H)(iv). Political committees are also required to report the name and address of each person who receives any expenditure from the committee in connection with an expenditure under section 441a(d), together with the date, amount, and purpose of the expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made. 2 U.S.C. § 434(b)(6)(B)(iv).

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[4] The Office of the General Counsel does not contest the validity of this authorization.

Additionally, the Commission has permitted state parties to assign their section 441a(d) limitations to the national party. *See Federal Election Commission* v. *Democratic Senatorial Committee*, 454 U.S. 27 (1981). The effect of this assignment is that the national party makes section 441a(d) expenditures on behalf of the state party. Such an authorization must be writing and be made prior to the time when the authorizing party has exhausted its section 441a(d) limit.

In its advisory opinions, the Commission has addressed the issue of whether certain communications are subject to the limitations of section 441a(d). The Commission has consistently taken the position that expenditures are subject to the limitations of section 441a(d) where they are made for the purpose of influencing the general election, depicit a clearly identified candidate, and convey an electioneering message. As developed below, because all three of these criteria have been met, Wirth Facts #1 is subject to the limitation of section 441a(d), and thus, the State Party exceeded the Act's expenditure limitations.

1. The Expenditure was in Connection With the General Election

In determining whether or not expenditures are made for the purpose of influencing the general election, the Commission has concluded that section 441a(d) expenditures are not necessarily restricted to the time period between nomination and election. *See* A.O. 1984-15. Rather, where a candidate appears assured of his or her party's nomination, the general election campaign, at least from the political party's perspective, may begin prior to formal nomination. The Commission has further concluded that such general election expenditures may be made in instances where the expending party is not certain of its own nominee. It is only necessary that the expenditures benefit the person eventually nominated by that party. *Id.* Therefore, if Tim Wirth was assured of his party's nomination prior to when the expenditure for Wirth Facts # 1 was made,

the State Party's anti-Wirth expenditure was for the general election.

Tim Wirth was assured of his party's nomination when Wirth Facts #1 was aired in April, 1986. Mr. Wirth was the only Democrat actively seeking his party's nomination.[5] The Colorado Democratic Party, as the complainant in this matter, considered Mr. Wirth to be the Democratic candidate in the general election prior to his formal nomination. *See* Complaint at pp. 2 and 5. Moreover, the State Party's own political director was quoted in a new account attached to the complaint stating "Wirth has been getting a free ride, while our candidates are involved in primary races." Complaint at I. Accordingly, the anti-Wirth Ad was aired when Tim Wirth was assured of his party nomination, and thus constitutes a general election expenditure.

2. Wirth Facts #1 Was An Expenditure For A Clearly Identified Candidate

There also cannot be a dispute that the Ad referred to a clearly identified candidate. Under the Act and the Commission's Regulations, a candidate is clearly identified in a communication if the name of the candidate involved appears, or his or her likeness appears, or if his or her identity is apparent by unambiguous reference. 2 U.S.C. § 431(18) and 11 C.F.R. § 106.1(d). *See also* A.O. 1985-14. The Ad refers to a person named "Tim Wirth" who is attempting to convince Colorado voters of something suggested to be untrue. Tim Wirth is further identified as an individual running for Senate. Therefore, because Wirth Facts #1 names Democratic Senatorial Candidate Tim Wirth, he is a clearly identified candidate in the Ad within the meaning of the Act and the Regulations.

---

[5] The State Party's response to the complaint noted news accounts referring to the possible candidacy of an unemployed college student who lacked a formal organization and who allegedly made expenditures totalling $600 to challenge Tim Wirth for the Democratic nomination. This rumored candidacy with minimal spending does not undercut the certainty of Mr. Wirth's nomination.

3. The Ad Contains An Electioneering Message

The Commission has further required that for an expenditure to be subject to section 441a(d) it must contain an electioneering message. An electioneering message includes statements "designed to urge the public to elect a certain candidate or party." *United States* v. *United Auto Workers*, 352 U.S. 567, 587 (1957); *see also* A.O. 1984-15, A.O. 1985-14; A.O. 1984-62.[6] As discussed below, the context and content of this Ad leads to the conclusion that it contains an electioneering message.

An examination of the context in which the Ad ran shows that Wirth Facts #1 aired in April, 1986, after Tim Wirth had announced his Senate candidacy and at a time when it was clear that no other person would actively seek the Democratic nomination. The area where the Ad aired is also relevant. The Ad played on 19 Colorado radio stations and was directed solely to people in that state. Thus, the Ad was directed to the class of persons who could cast their ballots for or against Tim Wirth. Moreover, according to news accounts attached to the complaint, the Ad circulated at a time when the State Party's political director was concerned that Tim Wirth was without primary opposition, unlike the potential Republican nominees.

The content of the Ad itself also illustrates that it contained an electioneering message. The Ad addresses Tim Wirth's positions on defense spending and the balanced budget. Respondents acknowledge these to be issues of great concern to the people of Colorado. As Respondents concede in their response, there is no question that the Ad critizes Tim Wirth's record. Indeed, Wirth Facts #1 references Mr. Wirth's record in Congress and juxtaposes that record with alleged inconsistences regarding his positions on defense spending and balanced

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[6] Included within this broad definition of electioneering message are statements of express advocacy such as "vote Republican" or "vote for Smith." Because an electioneering message is a broader standard than express advocacy, it is unnecessary to determine whether or not Wirth Facts #1 contains express advocacy.

budget, issues set forth by Mr. Wirth in his campaign ads. Moreover, the Ad explicitly notes that while running for Senate Mr. Wirth is "changing the facts." In short, attacks on the credibility of a candidate regarding issues of acknowledged public concern, based on his record and circulated in the state in which the candidate is running, lead to the obvious conclusion that the message of the Ad is that the candidate is dishonest and that voters should not support such a candidate but should instead support his opponent. Consequently, Wirth Facts #1 falls within the *United Auto Worker's* standard in that it is "designed to urge the public to elect a certain candidate or party," and thus constitutes an electioneering message.

4. Summary

As demonstrated above, Wirth Facts #1 was a general election expenditure depicting a clearly identified candidate and containing an electioneering message. Therefore, it was an expenditure subject to the limitation of section 441a(d). Because the State Party had assigned its ability to make coordinated party expenditures to the NRSC, and because the NRSC made such expenditures, the State Party was precluded from making any additional section 441a(d) expenditures. The State Party's subsequent section 441a(d) expenditures, therefore, exceeded the limitation of sections 441a(d) and 441a(f). Moreover, the State Party failed to report any section 441a(d) expenditures in violation of 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Accordingly, this Office recommends that the Commission find probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 441a(d), 441a(f), 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv).

IV. RECOMMENDATION

Find probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. § 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), 441a(d) and 441a(f).

_____ _____

Date

Lawrence M. Noble
General Counsel

APPENDIX I

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

November 13, 1986

Jan Baran, Esquire
Wiley & Rein
1776 K Street N.W.
Washington, D.C. 20006

RE: MUR 2186
The Colorado Republican
Federal Campaign Committee
and Vincent Zarlengo,
as treasurer

Dear Mr. Baran:

The Federal Election Commission previously notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on November 5, 1986, determined that there is reason to believe that your clients have violated provisions of the Act.

Specifically, it appears that the disbursements made by your clients for a radio advertisement discussing defense issues (*See* Complaint at Attachment C) were found to be expenditures in connection with the general election for senator in the State of Colorado, and thus appear to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A). Thus, the Commission found reason to believe the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Additionally, the Commission considered

allegations regarding other ads noted in the complaint, but failed to pass a motion to find reason to believe your clients violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with these ads.

Your response to the Commission's initial notification of this complaint did not provide complete information regarding the matters in question. Please submit answers to the enclosed questions and the requested documents within fifteen days of receipt of this letter. Statements should be submitted under oath.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, requests for pre-probable cause conciliation will not be entertained after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of General Counsel is not authorized to give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Patty Reilly, attorney assigned to this matter, at 376-8200.

Sincerely,

Joan D. Aikens
Chairman

Enclosures
Procedures
Questions and Document Request

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	}	MUR 2186
QUESTIONS AND DOCUMENT REQUEST TO:		The Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer

As used in these questions and request, the terms listed below are defined as follows:

1. The terms "and" and "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of this request any answers or documents which may be otherwise construed to be out of its scope.

2. "Identify" or "identity" with respect to individuals shall mean the full name, last known residence address of such individual, the last known place of business where such individual is or was employed, and the title of the job, office or position held.

The Commission requests that you answer the following questions.

1. The complaint in MUR 2186 contains at Attachment C the text of a radio ad ("The Ad") discussing defense issues "Paid for by the Colorado Republican State Central Committee." For the Ad state:
   a. The cost of the Ad.
   b. Who paid for the Ad.
   c. If Ad was paid for by the Colorado Republican Federal Campaign Committee, state whether the cost of the Ad or any portion of the Ad has been

included in reports to the Federal Election Commission, and if so, specify where in the reports.

d. Identify the vendor(s) from whom the Ad was purchased.

2. State whether the Colorado Republican Federal Campaign Committee's "allocated share of overhead expenses" as reported on its reports filed with the Federal Election Commission contains any amounts expended in connection with the Ad noted in your responses to questions 1. If so, specify all amount(s) expended.

DESCRIPTION OF PRELIMINARY PROCEDURES FOR PROCESSING COMPLAINTS FILED WITH THE FEDERAL ELECTION COMMISSION

Complaints filed with the Federal Election Commission shall be referred to the Enforcement Division of the Office of General Counsel, where they are assigned a MUR (Matter Under Review) number and assigned to a staff member. Within 5 days of receipt of a complaint, the Commission shall notify, in writing, the respondent listed in the complaint that the complaint has been filed and shall include with such notification a copy of the complaint. Simultaneously, the complainant shall be notified that the complaint has been received and will be acted upon. The respondent(s) shall then have 15 days to demonstrate, in writing, that no action should be taken against him/her in response to the complaint.

At the end of the 15 days, the Office of General Counsel shall report to the Commission making a recommendation(s) based upon a preliminary legal and factual analysis of the complaint and any submission made by the respondent(s). A copy of respondent's submission shall be attached to the Office of General Counsel's report and forwarded to the Commission. This initial report shall recommended either: (a). that the Commission find reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act (FECA) and that the Commission will conduct an investigation of the matter; or (b). that the Commission finds no reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act (FECA) and, accordingly, that the Commission close the file on the matter.

If, by any affirmative vote of four (4) Commissioners, the Commission decides that it has reason to believe that a person has committed or is about to commit a violation of the Federal Election Campaign Act (FECA), the Office of General Counsel shall open an investigation into the matter. During the investigation, the Commission shall have the power to subpoena documents, to subpoena individuals to appear for deposition, and to

order answers to interrogatives. The respondent(s) may be contacted more than once by the Commission during its investigation.

If, during this period of investigation, the respondent(s) indicate a desire to enter into conciliation, the office of General Counsel staff may begin the conciliation process prior to a finding of probable cause to believe a violation has been committed. Conciliation is an informal method of conference and persuasion to endeavor to correct or prevent a violation of the Federal Election Campaign Act (FECA). Most often, the result of conciliation is an agreement signed by the Commission and the respondents. The Conciliation Agreement must be adopted by four votes of the Commission before it becomes final. After signature by the Commission and the respondent(s), the Commission shall make public the Conciliation Agreement.

[If the investigation warrants], and no conciliation agreement is entered into prior to a probable cause to believe finding, the General Counsel must notify the respondents of this intent to proceed to a vote on probable cause to believe that a violation of the Federal Election Campaign Act (FECA) has been committed or is about to be committed. Included with the notification to the respondents shall be a brief setting forth the position of the General Counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, the respondents may submit a brief posing the position of the respondent(s) and replying to the brief of the General Counsel. Both briefs will then be filed with the Commission Secretary and will be considered by the Commission. Thereafter, if the Commission determines by an affirmative vote of four (4) Commissioners, that there is probable cause to believe that a violation of the FECA has been committed or is about to be committed conciliation must be undertaken for a period of at least 30 days but not more than 90 days. If the Commission is unable to correct or prevent any violation of the FECA through conciliation the Office of General Counsel may recommend that the Commission file a civil suit against the respondent(s) to enforce the

Federal Election Campaign Act (FECA). Thereafter, the Commission may, upon an affirmative vote of four (4) Commissioners, institute civil action for relief in the District Court of the United States.

See 2 U.S.C. § 437g, 11 C.F.R. Part 111

APPENDIX J

TITLE 2 U.S.C. § 441a (1994)

Limitation on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and

among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that

(A) nothing is this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceed by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in co-operation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign

committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) *Dollar limits on expenditures by candidates for office of President of the United States.*

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000 in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of

Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) *Increases on limits based on increases in price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year of 1974.

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(e) *Certification and publication of estimated voting age population.*

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) *Prohibited contributions and expenditures.*

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) *Attribution of multi-State expenditures to candidate's expenditure limitation in each State.*

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) *Senatorial candidates.*

Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

Title 2 U.S.C. § 437f (1994)

Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.*

Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by-

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon an provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.*

The Commission shall make public any requests made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

APPENDIX K

11 C.F.R. CH. 1
(1995)

§ 110.7 Party committee expenditure limitations (2 U.S.C. 441a(d)).

(a)(1) The national committee of a political party may make expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The expenditures shall not exceed an amount equal to 2 cents multiplied by the voting age population of the United States.

(3) Any expenditure under this paragraph (a) shall be in addition to--

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under § 110.1 or § 110.2.

(4) The national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees.

(5) The national committee of a political party may not make independent expenditures (see part 109) in connection with the general election campaign of a candidate for President of the United States.

(6) Any expenditures made by the national, state and subordinate committees of a political party pursuant to 11 CFR 110.7(a) on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b)(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The expenditures shall not exceed--

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of--

(A) Two cents multiplied by the voting age population of the State; or

(B) Twenty thousand dollars; and

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) Any expenditure under paragraph (b) shall be in addition to any contribution by a committee to the candidate permissible under § 110.1 or § 110.2.

(4) The party committees identified in (b)(1) shall not make independent expenditures in connection with the general election campaign of candidates for Federal office.

(c) For limitation purposes, State committee includes subordinate State committees. State committees and subordinate State committees combined shall not exceed the limits in paragraph (b)(2) of this section. To ensure compliance with the limitations, the State committee shall administer the limitation in one of the following ways:

(1) The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission which permits control over expenditures.

(2 U.S.C. 438(a)(8), 441a, 441d, 441e, 441f, 441g, 441h, 441i)

[41 FR 35948, Aug. 25, 1976, as amended at 45 FR 15119, Mar. 7, 1980; 45 FR 27435, Apr. 23, 1980; 45 FR 43387, June 27, 1980]

APPENDIX L

RADIO ADVERSTISEMENT

Text of the First Republican Anti-Wirth Radio Spot, re: defense.

Paid for by the Colorado Republican State Central Committee

Here in Colorado we're use to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have the right to change the facts.

PAMPHLET

"It's absolutely criminal the amount of money this country is spending on defense."

Congressman Tim Wirth
The Rocky Mountain News
May 29, 1983

Tim Wirth is the kind of politician who wants it both ways. He wants the liberal, anti-defense crowd back in Washington to know that they can count on him when it comes time to kill any effort to modernize our military. That's why in Congress, he's voted against every major new weapons system in the past five years. But back here in Colorado he wants folks to believe that he thinks America should have the best system of national defense that money can buy. Which is the real Tim Wirth? Check the record inside.

You can't change the facts, Tim.

Tim Wirth Says He Wants A Strong Defense For America?

Then Why Doesn't He Vote That Way?

Tim Wirth is spending a lot of money these days to try and convince people in Colorado that he really wants our country to have a strong, modern military ready to defend our borders and our friends abroad.

☒ NO Wirth voted against the Strategic Defense Initiative program to protect America against Russian missiles (Congressional Quarterly 164. June 28, 1985)

☒ NO Wirth voted against building the new B-1 bomber to replace the outmoded B-52's that have been in our airforce since the Korean War (Congressional Quarterly 148. May 23, 1984)

☒ NO Wirth voted against funding important defense weapons 48 times since 1975 (The Congressional Record)

Thousands of dollars in slick television ads may change a few minds, but it can't challenge the facts.

Take a look at how Tim Wirth has voted on issues in Congress that directly affect the strength of our defense systems.

☒ YES Wirth sponsored legislation to allow people who objected to the military not to have their tax dollars pay for national defense (HR 3032 July 17, 1985)

☒ YES Wirth voted to protect draft dodgers from having their college aid cut off by the Federal Government. (Congressional Quarterly 211, July 28, 1982)

☒ YES Wirth voted to cut $108 million from civil defense programs designed to protect our military personnel (Congressional Quarterly 215 July 29, 1982)

[Photos Omitted in Printing]

RADIO ADVERTISEMENT

[The following is a transcript of the Republican party ad re: Tim Wirth and telephones, first aired on KOA Radio, May 2, 7:25 a.m.]

* * *

Ringing phone.

Voice: "When it comes to telephone service, a lot has changed in the last few years--none of it for the better."

Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service, or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion. So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts, Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial tone.

* * *

PAMPHLET

Confused About The Break Up Of The Telephone Company?

The Voter Education Project
Colorado Republican Party
Denver, Colorado

Everyone I have spoken with thinks that the AT&T divestiture has been a disaster and that the Congressman (Tim Wirth) had a lot to do with it . . . if people hold him personally responsible for the telephone break up, he's going to have big problems."

Columnist David Ethan Greenberg
The Denver Post
January 12, 1986

Tim Wirth **does** have big problems.

People in Colorado are having big problems getting the kind of phone service they deserve and at a fair price.

With Tim Wirth's support and encouragement America's phone system was broken up.

The result is that we all pay more and pay for things we used to get for free, like directory information.

Tim Wirth wants you to forget the role he played in busting up AT&T.

He wants you to believe that it's all a mistake and he had nothing to do with it.

It won't work.

Coloradans are smarter than that.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Central Committee

So Is The Man Who Worked The Hardest To Make It Happen Congressman Tim Wirth

A lot of people wonder why it was necessary to bust up one of the most efficient communications systems in the world, the telephone company.

Now a lot of folks are hopping mad over poor service, confusing choices between companies and most of all, HIGHER PHONE BILLS!!

What about the man who did more than any other member of the U.S. House of Representatives to try and make it happen?

Well, like a lot of politicians, Tim Wirth starts to change his tune when things go wrong.

As the chairman of the key Congressional subcommittee responsible for the legislation to break up AT&T, Tim Wirth called the splitting up of the national phone network, **"a positive first step."**

Today, with people discovering what tearing apart the phone company means in terms of their pocketbooks and peace of mind. Tim Wirth is singing a new song.

It was all "unnecessary," he says. "Too far, too fast."

That's the style of some politicians. They wheel and deal and when things turn sour, they want you to forget they ever had anything to do with it.

It may be fashionable in Washington, D.C. to turn your back and walk away from a mess you helped create.

That's not the way we do things in Colorado.

You can't change the facts, Tim.

RADIO ADVERTISEMENT

[The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth's position on telecommunications policy]

* * *

Ringing phone.

Voice: "When it comes to telephone service, a lot has changed in the last few years—none of it for the better."

Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service, or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion. So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts, Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial tone.

* * *

RADIO ADVERTISEMENT

[The following is a transcript of the State Committee's radio broadcast discussing Congressman Wirth's positions on defense]

Paid for by the Colorado Republican State Central Committee

Here in Colorado we're use to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

RADIO ADVERTISEMENT

[The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth's position on telecommunications policy and on the credibility of his statements on the issue]

Paid for by the Colorado Republican State Central Committee

There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R. 5158 gave "legislative sanction to the divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking up the phone company was a bad idea, but as far as we could tell that's what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts."

PAMPHLET

Tim Wirth Says He Wants A Strong Defense For America?

Then Why Doesn't He Vote That Way?

Tim Wirth is spending a lot of money these days to try and convince people in Colorado that he really wants our country to have a strong, modern military ready to defend our borders and our friends abroad.

☒	NO	Wirth voted against the Strategic Defense Initiative program to protect America against Russian missiles (Congressional Quarterly 164. June 28, 1985)
☒☒	NO	Wirth voted against building the new B-1 bomber to replace the outmoded B-52's that have been in our airforce since the Korean War (Congressional Quarterly 148. May 23, 1984)
☒☒☒	NO	Wirth voted against funding important defense weapons 48 times since 1975 (The Congressional Record)

Thousands of dollars in slick television ads may change a few minds, but it can't challenge the facts.

Take a look at how Tim Wirth has voted on issues in Congress that directly affect the strength of our defense systems.

☒	YES	Wirth sponsored legislation to allow people who objected to the military not to have their tax dollars pay for national defense (HR 3032 July 17, 1985)
☒☒	YES	Wirth voted to protect draft dodgers from having their college aid cut off by the Federal Government. (Congressional Quarterly 211, July 28, 1982)

☒☒☒ YES Wirth voted to cut $108 million from civil defense programs designed to protect our military personnel (Congressional Quarterly 215 July 29, 1982)

[Photos Omitted in Printing]

"It's absolutely criminal the amount of money this country is spending on defense."

Congressman Tim Wirth
The Rocky Mountain News
May 29, 1983

Tim Wirth is the kind of politician who wants it both ways. He wants the liberal, anti-defense crowd back in Washington to know that they can count on him when it comes time to kill any effort to modernize our military. That's why in Congress, he's voted against every major new weapons system in the past five years. But back here in Colorado he wants folks to believe that he thinks America should have the best system of national defense that money can buy. Which is the real Tim Wirth? Check the record inside.

You can't change the facts, Tim.

PAMPHLET

Confused About The Break Up Of The Telephone Company?

The Voter Education Project
Colorado Republican Party
Denver, Colorado

So Is The Man Who Worked The Hardest To Make It Happen Congressman Tim Wirth

A lot of people wonder why it was necessary to bust up one of the most efficient communications systems in the world, the telephone company.

Now a lot of folks are hopping mad over poor service, confusing choices between companies and most of all, **HIGHER PHONE BILLS!!**

What about the man who did more than any other member of the U.S. House of Representatives to try and make it happen?

Well, like a lot of politicians, Tim Wirth starts to change his tune when things go wrong.

As the chairman of the key Congressional subcommittee responsible for the legislation to break up AT&T, Tim Wirth called the splitting up of the national phone network, **"a positive first step."**

Today, with people discovering that tearing apart the phone company means in terms of their pocketbooks and peace of mind. Tim Wirth is singing a new song.

It was all "unnecessary," he says. "Too far, too fast."

That's the style of some politicians. They wheel and deal and when things turn sour, they want you to forget they ever had anything to do with it.

It may be fashionable in Washington, D.C. to turn your back and walk away from a mess you helped create.

That's not the way we do things in Colorado.

You can't change the facts, Tim.

Everyone I have spoken with thinks that the AT&T divestiture has been a disaster and that the Congressman (Tim Wirth) had a lot to do with it . . . if people hold him personally responsible for the telephone break up, he's going to have big problems."

Columnist David Ethan Greenberg
The Denver Post
January 12, 1986

Tim Wirth **does** have big problems.

People in Colorado are having big problems getting the kind of phone service they deserve and at a fair price.

With Tim Wirth's support and encouragement America's phone system was broken up.

The result is that we all pay more and pay for things we used to get for free, like directory information.

Tim Wirth wants you to forget the role he played in busting up AT&T.

He wants you to believe that it's all a mistake and he had nothing to do with it.

It won't work.

Coloradans are smarter than that.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Central Committee

Supreme Court, U.S.
FILED
NOV 22 1995
OFFICE OF THE CLERK

(2)

No. 95-489

In the Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN
FEDERAL CAMPAIGN COMMITTEE
AND DOUGLAS JONES, TREASURER, PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. Whether 2 U.S.C. 441a(d), which permits political party committees to make a limited amount of coordinated expenditures in excess of the contribution limits applicable to coordinated expenditures by others, violates the First Amendment rights of party committees.

2. Whether the court of appeals erred by giving deference to the Federal Election Commission's construction of 2 U.S.C. 441a(d).

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In the Supreme Court of the United States

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FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-21a) is reported at 59 F.3d 1015. The opinion of the district court (Pet. App. 22a-36a) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A suggestion for rehearing in banc was denied on September 6, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.* The Act limits contributions to candidates for federal office. Individuals may contribute no more than $1,000, and multicandidate political committees no more than $5,000, with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A). The Act also provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or his agents "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i).

An exception to the generally applicable limits permits the national and state committees of a political party to make additional coordinated expenditures "in connection with the general election campaign of candidates for Federal office." 2 U.S.C. 441a(d)(1). In elections for the United States Senate, the extended limit is the greater of $20,000 or 2 cents times the voting age population of the State. 2 U.S.C. 441a(d)(3)(A). If a state party committee chooses not to make the coordinated expenditures permitted by law, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981) (*DSCC*). The Federal Election Commission (FEC)[1] has determined that

[1] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has expressly authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1) and 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

only an expenditure for a communication referring to a "clearly identified candidate" and containing an "electioneering message" constitutes a "coordinated party expenditure" subject to the limitation of Section 441a(d). FEC Advisory Op. 1985-14, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (May 30, 1985); see FEC Advisory Op. 1984-15, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (May 31, 1984).

The FECA also requires detailed recordkeeping and reporting of all contributions and expenditures. 2 U.S.C. 432, 444. Coordinated expenditures made pursuant to Section 441a(d) must be reported separately from other contributions and expenditures. 2 U.S.C. 434(b)(4)(H)(iv).

2. Petitioner Colorado Republican Federal Campaign Committee voluntarily assigned to the National Republican Senatorial Committee its entire coordinated expenditure authority ($103,248) for the 1986 Senate campaign. Pet. App. 9a. Petitioner subsequently spent $15,000 to broadcast a radio advertisement, "Wirth Facts #1," attacking the active Senate campaign of then-Representative Timothy E. Wirth. The text of the advertisement read as follows:

> Paid for by the Colorado Republican State Central Committee.
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the

> last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

Id. at 6a-7a & n.1. At a press conference contemporaneous with the broadcast of the advertisement, the chairman of the Colorado Republican Party explained that only after "the public know[s] what Tim Wirth's record really is * * * will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator." C.A. App. 318.

After investigating an administrative complaint filed pursuant to 2 U.S.C. 437g(a)(1), the Commission determined that petitioner's expenditures on "Wirth Facts #1" were coordinated party expenditures made "in connection with" a campaign for federal office, and were therefore subject to the limitations of 2 U.S.C. 441a(d). Because petitioner had previously assigned away its entire coordinated expenditure authority, the Commission found probable cause to believe that petitioner had violated 2 U.S.C. 441a(f), which prohibits expenditures in violation of Section 441a. Because petitioner had failed to report the expenditures as expenditures subject to Section 441a(d), the FEC also found probable cause to believe that petitioner had violated the reporting requirements of 2 U.S.C.

434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Pet. App. 56a; see *id.* at 43a-46a.[2]

3. After conciliation efforts under 2 U.S.C. 437g(a)(4) proved unsuccessful, the Commission authorized the filing of this civil enforcement action. The district court granted petitioners' motion for summary judgment. Pet. App. 22a-36a. The court concluded that the expenditure in question had not been made "in connection with the general election campaign of a candidate for Federal office" within the meaning of Section 441a(d)(3). In the district court's view, a coordinated expenditure is made "in connection with" a federal election campaign only if the communication in question contains "express advocacy" of the election or defeat of a particular candidate. Pet. App. 28a-32a. The court placed substantial reliance on *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which involved a prohibition (2 U.S.C. 441b(a)) on independent expenditures by designated corporate entities "in connection with any election to any political office." The Court in *MCFL* held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249. The district court in the instant case, applying the canon of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning," Pet. App. 28a (internal quotation marks omitted), concluded that the phrase "in connec-

---

[2] The administrative complaint also challenged petitioners' expenditures on two other radio advertisements and two pamphlets, all of which criticized Representative Wirth's record without alluding to his ongoing Senate campaign. The Commission did not find probable cause to believe that those expenditures violated the Act. Pet. 3-4; see Pet. App. 93a-105a.

tion with" should be given the same construction in Section 441a(d)(3) as in Section 441b. Pet. App. 28a-29a. The court rejected the FEC's position that the phrase "in connection with," as used in Section 441a(d)(3), should be construed to cover communications that contain a "clearly identified candidate" and an "electioneering message." See Pet. App. 29a. The court concluded that "Wirth Facts #1" did not contain "express advocacy" of Wirth's defeat, and that petitioners' expenditure on the advertisement therefore was not covered by Section 441a(d)(3). Pet. App. 32a-35a.

4. The court of appeals reversed. Pet. App. 5a-21a. The court first stated that "[t]he FECA does not clearly manifest the meaning Congress intended to attach to the 'expenditures in connection with' language in § 441a(d)(3)." *Id.* at 10a. The court found *MCFL* inapposite, since the independent expenditures limited by Section 441b are substantially different—both in their treatment under the FECA and in the degree of protection afforded them by the Constitution—from the coordinated expenditures at issue here. Pet. App. 10a-14a. In light of the FEC's "'primary and substantial responsibility for administering and enforcing' the FECA," *id.* at 15a (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 109 (1976)), the court of appeals concluded that the Commission's "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message is a reasonable one to which [the court] must defer," Pet. App. 15a-16a. The court found that Representative Wirth was a clearly identified candidate for the Senate at the time "Wirth Facts #1" was broadcast, *id.* at 17a,

and that the advertisement "unquestionably contained an electioneering message," *id.* at 18a.

The court of appeals then addressed and rejected petitioner's constitutional challenge to Section 441a(d). The court observed that "[t]he primary purpose of the contribution and expenditure caps in the FECA [is] to prevent corruption or the appearance of corruption," Pet. App. 19a, and that "[t]he same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees," *id.* at 20a. The court rejected the claim that contributions from committees operated by a political party can never be corrupting, *ibid.*, and concluded that "[b]y treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, 'secur[ing] a political *quid pro quo* from current and potential office holders,'" *id.* at 21a (quoting *Buckley* v. *Valeo*, 424 U.S. at 26). The court also rejected petitioner's argument that Section 441a(d) is a content-based restriction on speech, finding that it is instead a "monetary cap" applied as "a consequence of the funding source." Pet. App. 21a.

ARGUMENT

The decision of the court of appeals is not in conflict with any decision of this Court or of any other court. Indeed, petitioners do not contend that any prior judicial decision has held Section 441a(d) to be unconstitutional or has adopted the interpretation of that Section espoused by petitioners.

1. a. Beginning with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court has recognized a sharp constitu-

tional distinction between limitations on contributions to political candidates and limitations on independent expenditures. The Court in *Buckley* upheld the FECA's limitations on contributions because they serve a compelling interest in foreclosing opportunities for the corruption of candidates. The Court recognized that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." 424 U.S. at 26-27. The Court struck down the Act's limitations on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47. The Court has continued to emphasize the "fundamental constitutional difference" between contributions and independent expenditures, *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) (*NCPAC*), and has uniformly upheld the Act's restrictions on contributions in candidate elections. See, *e.g.*, *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981); *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*).

Because it is "[t]he absence of prearrangement and coordination" in an independent expenditure that alleviates the danger of *quid pro quo* corruption, *Buckley*, 424 U.S. at 47, Congress has validly determined that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, * * * shall be

considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). See *Buckley*, 424 U.S. at 46 ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA, * * * and as such are already subject to [the] $1,000 and $5,000 limitations in §§ 441a(a)(1), (2)"). This Court has also recognized that, because of a party committee's close relationship with the party's candidates, all expenditures by such a committee must be considered coordinated. See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 28-29 n.1 (1981) (*DSCC*) ("expenditures by party committees are known as 'coordinated' expenditures" because "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates").

b. Petitioner contends (Pet. 5-6, 12-14) that Section 441a(d) must be found unconstitutional unless the Commission can produce record evidence showing that federal candidates have in fact been corrupted by contributions from a political party. That argument ignores this Court's holding in *Buckley*, noted by the court of appeals in the present case (Pet. App. 21a), that avoiding actual corruption is not the only compelling interest justifying limits on contributions and coordinated expenditures. As the *Buckley* Court recognized, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27. See *NRWC*, 459 U.S. at 208 ("[I]n

Buckley * * * we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."). Because the *Buckley* Court found the appearance of corruption to be inherent in the process of coordination, it did not require evidence of actual corruption by particular classes of contributors.[3] Although the Court assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," 424 U.S. at 29, it upheld the FECA's $1,000 limit on contributions to candidates and political committees. The Court explained that it is "difficult to isolate suspect contributions," and that "Congress was justified in concluding that the interest in safeguarding against the appearance of

[3] There is no basis for petitioner's attempt (Pet. 15-17) to distinguish party committees from other political committees subject to the contribution limits upheld in *Buckley*. First, *all* political committees are voluntary associations that can accept contributions only in amounts specified in the Act and must publicly report their contributions and expenditures. Second, *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *MCFL*, 479 U.S. at 263-264, found a small class of political advocacy organizations to be exempt only from statutory limits on *independent* expenditures. In *MCFL*, the Court contrasted the limitations on independent expenditures with the regulation of contributions from political advocacy corporations such as MCFL, *id.* at 259-262, and confirmed that such corporations were subject to the same statutory restrictions on candidate contributions as were other corporations, *id.* at 264 n.13. The discussion from *NCPAC* (470 U.S. at 498) quoted by petitioner similarly referred only to independent expenditures. Finally, the disagreement of some law review writers with Congress's policy choices hardly renders those legislative judgments unconstitutional.

impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

In dealing with contributions and coordinated expenditures, the Court has "accept[ed] Congress' judgment" and has refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210. As the court of appeals observed, "[t]he members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties." Pet. App. 20a. Indeed, this Court has recognized that the limits on coordinated expenditures by political parties serve the same purpose as FECA's other contribution limits: "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC*, 454 U.S. at 41 (citing *Buckley*, 424 U.S. at 25). In *DSCC* the Court held voluntary agreements between state and national committees of a political party regarding Section 441a(d) expenditures to be permissible only because the Commission's decision to permit such agreements did not expand "the limitations on the amount that can be spent under the Act" by a political party. 454 U.S. at 41. That decision forecloses petitioner's argument that Section 441a(d) does not serve the anti-corruption purpose that was found in *Buckley* to justify

the statute's other restrictions on political contributions.[4]

c. Petitioner contends (Pet. 7) that under the court of appeals' approach, "political speech by political parties merits less protection than speech by banks, corporations, trade unions, and the like." In fact the reverse is true. The corporate entities subject to Section 441b are completely prohibited from making contributions or coordinated expenditures, 2 U.S.C. 441b(a); see *California Medical Ass'n*, 453 U.S. at 200-201, while Section 441a(d) "authorizes limited expenditures by the national and state committees of a political party in connection with a general election campaign for federal office * * * which otherwise would be impermissible" because of the statutory limitation on contributions, *DSCC*, 454 U.S. at 28. See also H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for this subsection, these expenditures would be covered by the contribution limitations"). Political parties are subject to distinct restrictions only in the sense that they have been

[4] Petitioner argues (Pet. 14) that Section 441a(d)'s population-based formula for calculating the coordinated party expenditure limit in each State somehow "refute[s] an anti-corruption purpose." The statutory formula simply reflects Congress's recognition that the expense of campaigning is generally proportional to the number of potential voters in a particular election. The formula preserves a roughly comparable role for political parties in Senate campaigns in each State, thus striking what Congress believed to be the appropriate balance between the prevention of actual or apparent corruption and the desire to "assur[e] that political parties will continue to have an important role in federal elections." *DSCC*, 454 U.S. at 41. Determining the precise level of appropriate contribution limits is a legislative judgment that does not raise constitutional concerns. *Buckley*, 424 U.S. at 30.

determined to be "incapable of making 'independent' expenditures in connection with the campaign of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1. Petitioners do not challenge that determination directly, however, nor do they cite any decision calling it into question, and this Court in *DSCC* quite clearly accepted that determination as the appropriate starting point for its analysis. There is consequently no basis for petitioners' claim that political parties are unfairly disadvantaged vis-a-vis other contributors.

2. This Court recognized in *DSCC* that the Commission's broad statutory powers and its "inherently bipartisan" character make it "precisely the type of agency to which deference should presumptively be afforded." 454 U.S. at 37. The court of appeals' decision in the instant case is consistent with other court of appeals decisions that have given deference to the Commission's construction of the FECA as expressed in formal advisory opinions issued pursuant to 2 U.S.C. 437f. See, *e.g.*, *FEC* v. *Ted Haley Congressional Committee*, 852 F.2d 1111, 1114-1115 (9th Cir. 1988); *Orloski* v. *FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986).[5]

[5] Petitioners' contention (Pet. 24) that Section 437f precludes deference to the Commission's advisory opinions unless they are promulgated as regulations was neither pressed nor passed upon below, and this Court therefore should not consider it. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981). In any event, the argument is without merit. Advisory Opinions 1984-15 and 1985-14 did not adopt legislative rules of the sort requiring a formal rulemaking, but merely interpreted the terms of the Act "with respect to a specific transaction or activity," as provided in Section 437f. The construction of the

Petitioners contend that the Commission's reading of Section 441a(d) is foreclosed by this Court's decisions in *MCFL*, 479 U.S. at 249, and *Buckley*, 424 U.S. at 74-79, which construed other provisions of the Act to apply only to communications that expressly advocate the election or defeat of a clearly identifiable candidate. The Court's construction of those provisions, however, was based on the constitutional concerns that would have attended any effort to impose more stringent limitations on independent expenditures. See *Buckley*, 424 U.S. at 78-79; *MCFL*, 479 U.S. at 248-249. As we explain above, see pages 7-9, *supra*, this Court has consistently recognized that regulation of contributions and coordinated expenditures is far less problematic. See *Orloski*, 795 F.2d at 166-167 ("the Court limited [the express advocacy definition] to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions."). As the court of appeals recognized, "[t]he distinction between independent expenditures and political party expenditures that are deemed to be contributions, and their different treatment by the Supreme Court, negates the necessity that 'expenditures in connection with' be construed identically in different sections of the

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Act enunciated in those advisory opinions is analgous to an interpretive rule, to which a reviewing court owes deference. See, *e.g.*, *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 922 (D.C. Cir. 1991), cert. denied, 503 U.S. 970 (1992); *Kennedy* v. *Shalala*, 995 F.2d 28, 30 n.3 (4th Cir. 1993); *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 154 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).

FECA." Pet. App. 13a-14a. See *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).[6]

Application of the "express advocacy" standard to the Act's limits on contributions and coordinated expenditures would permit any donor—including a corporation, union, or other interest group—to coordinate its own political expenditures with a candidate in exchange for the prospect of favorable treatment in office. Since it is the "prearrangement and coordination" with the candidate that creates the appearance of corruption in coordinated expenditures (see pages 8, 9-10, *supra*), such an expenditure can suggest the existence of a corrupt *quid pro quo* even if it is not spent on express advocacy. As this Court has observed, there would not be "much difficulty [in] devising expenditures that skirted the restriction on express advocacy of election or defeat but never-

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[6] Contrary to petitioners' contention (Pet. 21), the *Buckley* Court did not apply the express advocacy test to the contribution disclosure requirement of former 2 U.S.C. 434(e) (Supp. IV 1974). Instead, the Court construed "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee * * * but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," and found that "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." 424 U.S. at 78. It was only "[w]hen [the Court] attempt[ed] to define 'expenditure' in a similarly narrow way" that the Court found the "line-drawing problems" that required the express advocacy test. *Id.* at 78-79. In fact, the Court did not find that a narrowing construction was required even for independent expenditures of political committees; rather, it concluded that all expenditures by such committees "can be assumed to fall within the core area sought to be addressed by Congress" because "[t]hey are, by definition, campaign related." *Id.* at 79.

theless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45. Acceptance of petitioners' position would thus substantially impair the Act's effectiveness in reducing both the fact and the appearance of political corruption.

Finally, petitioners contend (Pet. 17-19) that Section 441a(d), as construed by the Commission, is impermissibly content-based and unconstitutionally vague. As the court of appeals recognized (Pet. App. 21a), the purpose of the statutory restrictions on coordinated expenditures is to limit the opportunity for corrupt transactions, not the dissemination of disfavored messages. Since the applicability of those restrictions does not rest on "disagreement with the message * * * convey[ed]," it is sufficiently content-neutral to satisfy constitutional requirements. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Indeed, the "express advocacy" test proposed by petitioners is no less content-based than the standard adopted by the Commission and approved by the court of appeals. In any event, this Court has consistently recognized that limitations on contributions and coordinated expenditures similar to those imposed by Section 441a(d)(3) serve compelling governmental interests and therefore survive strict scrutiny. See page 8, *supra*.

Petitioners' vagueness argument is similarly without merit. People of "common intelligence," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973), would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign

contained an "electioneering message."[7] In such circumstances neither the FECA nor the Commission's construction of it can be found unconstitutionally vague, even if the Act "may leave room for uncertainty at the periphery." *NRWC*, 459 U.S. at 211. Moreover, the statute provides a procedure for obtaining an advisory opinion from the Commission, see 2 U.S.C. 437f, which enables a party committee to "remove any doubt there may be as to the meaning of the law," *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973), with respect to a proposed expenditure. By "offer[ing] a prompt means of resolving doubts with respect to the statute's reach," Section 437f "mitigates whatever chill may be induced" by the Act. *Martin Tractor Co.* v. *FEC*, 627

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[7] Petitioners observe (see Pet. 19) that the Commission found probable cause to believe that their expenditure on "Wirth Facts #1" was covered by Section 441a(d)(3) but did not make a similar finding with respect to their expenditures on other advertisements critical of then-Representative Wirth. Petitioners contend (Pet. 19) that no meaningful difference between the advertisements exists and that the Commission's disparate treatment of them demonstrates the vagueness of the agency's standard. There is no merit to that contention. Unlike the other advertisements in question, "Wirth Facts #1" expressly linked its criticisms to Wirth's ongoing Senate campaign and explicitly challenged the integrity of Wirth's campaign statements. See Pet. App. 93a-105a; C.A. App. 318 (at press conference contemporaneous with broadcast of "Wirth Facts #1," Chairman of Colorado Republican Party asserted that Wirth had "purchased television time to baldly misstate his record on two key issues: defense and federal spending"). That distinction was clearly relevant to the question whether the advertisements at issue contained an "electioneering message."

F.2d 375, 384-385, 386 n.44 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1995

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No. 95-489

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Colorado Republican Federal Campaign Committee and Douglas L. Jones as Treasurer [1] respectfully submit this Reply to the Brief For the Respondent in Opposition to the Petition For Writ of Certiorari.

ARGUMENT

The government implies (Opp. at 7-9) that the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), resolved the constitutional issues relevant to this case. Respondents do not deny, however, that this Court in *Buckley* expressly reserved the question of whether § 441a(d)(3) of the Federal Election Campaign Act, on its face violates the First Amendment. *Id.* at 59, 60 n.67. Moreover, the government intimates (Opp. at 11) that this Court affirmed the constitutionality of § 441a(d)(3) in *FEC*

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[1] The petitioners will be referred to collectively as "Colorado Party" or "Party."

v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981). That case, however, did not involve a constitutional challenge to the statute. Rather it upheld a purely administrative determination made by the Federal Election Commission. Thus, the statement that "[t]he decision of the court of appeals is not in conflict with any decision of this Court or of any other court" (Opp. at 7) with respect to the constitutionality of § 441a(d)(3), is accurate only because this case, for the first time, squarely presents a First Amendment challenge to the constitutionality of § 441a(d)(3).

The issue reserved by *Buckley* is important. The limits of § 441a(d)(3) apply to every political party. As a result, during the nearly twenty years since *Buckley*, this statute has infringed, without review, on the rights of all political parties which make expenditures on behalf of candidates who associate with them. The validity of such a broadly applicable restriction should be reviewed by this Court.[2]

[2] Contrary to the government's suggestion (Opp. at 13 n.5), respondents squarely argued to the court of appeals that the FEC's interpretation was entitled to no deference. *See* C.A. Reply and Opposition Brief for Appellants, pp. 25-33. Respondents also argue (Opp. at 13) that the issue of deference to FEC advisory opinions has been resolved. It has not. Indeed, respondents' Opposition does not address the fact that the FEC issued inconsistent advisory opinions to which the circuit court deferred. Moreover, the cases relied upon by the government are inapt. In *FEC v. Ted Haley Congressional Committee*, 852 F.2d 1111, 1115 (9th Cir. 1988), the agency relied upon a regulation on point and the advisory opinions it issued were consistent. Furthermore, in *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986), the court noted that it had "been unable to locate any FEC advisory opinion . . . that sets forth the FEC's specific reason for adopting the interprtation at issue. . . ."

Thus, the fact that the circuit court relied upon these inconsistent advisory opinions and that they invoke a rule of law is squarely before this court. Finally, respondent's reliance on cases involving other agencies have no bearing on this matter which is unique to the FEC's enabling statute. This is an important issue to be resolved by the Court.

Lastly, during the entire ten year course of this proceeding, the FEC has maintained that it "made no finding distinguishing between Wirth Facts #1 and the other advertisements cited in the [administrative] complaint", C.A. App. 266; *see also* C.A. 323-24. Before the trial court and the court of appeals, the FEC could not and did not distinguish the advertisements. Only in this Court, in response to petitioner's vagueness challenge, does the government offer a "clearly relevant" distinction, (Opp. at 5 n.2 & 17 n.7), and opine that "[u]nlike the other advertisements in question, 'Wirth Facts #1' expressly linked its criticisms to Wirth's ongoing Senate campaign and explicitly challenged the integrity of Wirth's campaign statements." Opp. at 17, n.7. This *post hoc* rationalization by appellate counsel, never endorsed by the FEC, cannot be relied upon in this Court. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Moreover, when the advertisements are examined it is evident that all of them attacked the integrity of Tim Wirth's campaign statements, they just used different words to do so. Section 441a(d)(3) as construed below by the court of appeals and now applied by government counsel, does not distinguish between the advertisements with the precision, clarity and predictability that the First Amendment demands. *See Buckley*, 424 U.S. at 41, n.48.

CONCLUSION

In sum, this case presents important issues of law which must be resolved. For the above reasons and the reasons set forth in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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Respondent.

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---

JOINT APPENDIX

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February 16, 1996

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1995
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U.S. DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(DENVER)

Civil Docket for Case #: 89-CV-1159

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants

DOCKET ENTRIES

DATE	PROCEEDINGS
7/6/89	Complaint . . . pd Summons Issued Notice of Motion Motion for waiver of Local Rule 300 & 301 Memorandum in support of Motion for Waiver with supporting affidavit of Mr. Snyde; Certificate of Service
7/12/89	ORDER (ZLW) . . . that plaintiff's motion for order waiving application of requirements of Rule 300 and 301 is GRANTED . . . com . . . eod 7/12/89
8/2/89	UNOPPOSED MOTION for Waiver of Local Counsel Requirement . . . by Defendants COS Declaration of Jan W. Baran in Support of Defendants' Cross Motion for Waiver of Local Counsel Requirement
8/7/89	Notice and Acknowledgement of Receipt of S&C, signed by Jan W. Baran[], Counsel for Colorado Republican Federal Campaign Committee on 8/1/89 and another one signed by Jan W. Baran[], Counsel for Douglas L. Jones, Treasurer, on 8/1/89

DATE	PROCEEDINGS
8/16/89	ORDER (ZLW) . . . that defendants' motion for order waiving application of Local Rules 300 and 301 is GRANTED . . . com . . . eod 8/17/89
8/25/89	ANSWER & COUNTERCLAIM . . . by Defendants—cos
8/23/89	ORDER OF REFERENCE (ZLW) . . . to magistrate Schauer for pretrial . . . com . . . eod 8/25/89
10/20/89	Reply to Counterclaim by Plaintiff . . . cos
10/25/89	MINUTE ORDER (HS) . . . initial discovery conference held 10/23/89 . . . discovery cutoff date. 2/28/90 . . . further settlement/status conf. set 3/6/90 at 1:30 . . . com . . . eod 10/25/89
12/89	Letter to Counsel advising of case reassignment to Judge Nottingham
3/16/90	Notice of Motion to compel Motion by Plaintiff to Compel answers to interrogatories w/brief . . . COM
3/19/90	Notice of Motion to Compel . . . COM
3/28/90	Plaintiff Federal Election Commission's Opposition to Defendants' Motion to Compel Discovery . . . C.O.M.
3/29/90	HEARING (HS) . . . statements of counsel . . . plf. opposition to motion to compel filed 3/28/90 and defendant motion to strike filed 3/29/90 STRICKEN . . . plaintiff motion to compel filed 3/16/90 GRANTED with compliance by 4/16/90 . . . plaintiff to refile motion to open discovery . . . Defendant motion to compel filed 3/19/90 GRANTED except for interrogatories 18 and 19 . . . Pretrial 6/29/90 at 1:30 . . . eod 3/30/90. Motion to Strike plaintiff briefs and impose sanctions on plaintiff counsel . . . COM

DATE	PROCEEDINGS
4/3/90	Transcript of Electronically recorded proceedings before Magistrate Schauer on 3/29/90 (pages 1-60)
4/30/90	MOTION of federal election commission to extend discovery
5/3/90	MINUTE ORDER (HS) . . . defs. to respond to motion to extend discovery by 5/15/90
5/15/90	OPPOSITION TO Plaintiff's motion for an extension of discovery . . . by defendants. MOTION for summary judgment . . . by defendants. MEMORANDUM in support of defendants motion for summary judgment . . . by defendants Statement of undisputed facts and support exhibits . . . by defendants . . . Certificate of Service for Motion for Summary Judgment and memo and Statement of Undisputed facts filed 5/15/90.
5/17/90	ORDER (HS) . . . discovery extended to 6/27/90 to permit plaintiff to depose certain individuals . . . Pretrial 6/29/90 at 1:30 . . . COM COS Motion to extend discovery
5/21/90	MINUTE ORDER (EWN) . . . response to motion for summary judgment to be in accordance with rules, reply due 10 days thereafter . . . COM
5/25/90	Notice of Deposition of Howard Callaway 6/5/90
5/29/90	PLAINTIFF's Motion To Hold This Case In Abeyance Or, Alternatively, For An Extension Of Time To Respond To Defendant's Summary Judgment Motion
5/30/90	Defendant's Opposition to Plaintiff's Motion to Hold This Case In Abeyance Or, Alternatively, For An Extension Of Time To Respond To Defendants' Summary Judgment Motion . . . Certificate of Service
6/5/90	Submission by Federal Election Commission under Rule 56 and Affidavit

DATE	PROCEEDINGS
6/12/90	Defendant's response to plaintiff's submission pursuant to Rule 56(F)
6/13/90	Notice of Deposition of Kay Riddle on 6/22/90 at 10:00 Notice of Deposiiton of Doug Goodyear on 6/22/90 at 2:00 Return of Service returned unexecuted as were unable to serve by due date 6/4/90 by Benny L. Bailey
6/14/90	Minute Order (EWN) . . . Ordered that plaintiff will respond to the pending motion for summary judgment on or before 7/6/90 . . . FURTHER ORDERED that all other dispositive motions in this case by filed by 7/6/90 . . . FURTHER ORDERED that no further extension of time will be granted.
6/20/90	MOTION by defendant Colorado Republican, defendant Douglas Jones for protective order, and for sanctions (yk) [Entry date 06/25/90]
6/20/90	CERTIFICATE of service of motion by defendant Colorado Republican, defendant Douglas Jones (yk) [Entry date 06/25/90]
6/21/90	Opposition by plaintiff Federal Election Com to motion for protective order [1-1], motion for sanctions [1-2] (yk) [Entry date 06/25/90]
6/21/90	CERTIFICATE by defendant Colorado Republican, defendant Douglas Jones of faxing Notice of Withdrawal of Motion (yk) [Entry date 06/25/90]
6/25/90	MOTION by plaintiff, defendant to defer pretrial and preparation of pretrial order pending rlg on mtns (yk) [Entry date 06/28/90]
6/26/90	ORDER by Magistrate Hilbert Schauer granting [5-1] motion to defer pretrial Parties shall brief the summary judgment motions. Within 15 days

DATE	PROCEEDINGS
	after a ruling has been entered on the cross motions for summary judgment, a joint proposed scheduling order shall be submitted to magistrate for consideration (cc: all counsel) (pa) [Entry date 07/03/90]
7/6/90	RESPONSE by plaintiff Federal Election Comm to def statement of undisputed facts and supporting exhibits (yk) [Entry date 07/09/90]
7/6/90	STATEMENT by plaintiff Federal Election Comm of material facts not in genuine dispute and supporting exhibits (yk) [Entry date 07/09/90]
7/6/90	Motion by plaintiff Federal Election Com for summary judgment before Judge Edward W. Nottingham (yk) [Entry date 07/09/90]
7/6/90	BRIEF by plaintiff Federal Election Com in support of motion for summary judgment before Judge Edward W. Nottingham [9-1] (yk) [Entry date 07/09/90]
7/8/90	MINUTE ORDER: by Judge Edward W. Nottingham re mtn summary judgment [9-1] response due in accordance w/rules, reply due 10 days thereafter (cc: all counsel) (yk) [Entry date 07/10/91]
7/25/90	RESPONSE by defendant Colorado Republican, defendant Douglas Jones to plf statement of material facts notin dispute (yk) [Entry date 07/27/90]
7/25/90	BRIEF by defendant Colorado Republican in opposition to motion for summary judgment and in reply to plf opposition to def mtn summary judgment before Judge Edward W. Nottingham [9-1] (yk) [Entry date 07/27/90]
8/7/90	REPLY by plaintiff Federal Election Com re [9-1] (1f)
11/14/90	LETTER to court from plaintiff counsel w/addl citation (yk) [Entry date 11/16/90]

DATE	PROCEEDINGS
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11/8/93	NOTICE OF TRANSCRIPT ORDER FORM filed by defendants/appellants; (Transcript not necessary) re appeal [21-1] (gc)
11/8/93	NOTICE OF TRANSCRIPT ORDER FORM filed by plaintiff/appellant Federal Election Com; (Transcript not necessary) re appeal [22-1] (gc)
11/8/93	LETTER (Re: [22-1], [21-1]) to USCA and all counsel advising that records is now complete . . . tofs filed stating transcripts not necessary. (gc)
9/15/95	MANDATE from the Court of Appeals; CA #93-1433 and 93-1434; Dt issued 9/14/95; JUDGMENT dated 6/23/95 reversing the decision of the District Court and remanding w/ instructions that the District Court enter judgment in favor of FEC and for a determination under 2 USC 437g(a)(6) of the appropriate civil penalty. re: [Appeal [22-1], [Appeal [21-1]; Mandated order deadline set for 11/14/95 (gc) [Entry dated 09/18/95]
9/15/95	MINUTE ORDER: by Judge Edward W. Nottingham; status conf set for 2:30 9/29/95 (cc: all counsel); entry date: 9/19/95 (yk) [Entry date 09/19/95]
9/28/95	MOTION by plaintiff Federal Election Com, defendant Colorado Republican for leave to appeal by phone (yk) [Entry date 10/02/95]
9/29/95	ORDER by Judge Edward W. Nottingham finding the motion for leave to appear by phone [30-1] moot; status conf set 9/29/95 is vacated (cc: all counsel); entry date: 10/2/95 (yk) [Entry date 10/02/95]
10/6/95	NOTIFICATION from Court of Appeals regarding Petition for Writ of Certiorari Filed in US Supreme Court on 9/21/95 Case No 95-489 (re appeal [22-1], (re appeal [21-1] (gc)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433 and 93-1434

FEDERAL ELECTION COMMISSION,
Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
	Proceedings in Case No. 93-1433
11/1/93	[718341] Civil case docketed. Preliminary record filed. Transcript order form due 11/12/93 for Roxie English pursuant to R.42.1. Docketing statement due 11/12/93 for Douglas Jones, for Colorado Republican. Notice of appearance due 11/12/93 for Douglas Jones, for Colorado Republican, Federal Election. (pdw) [93-1433]
11/5/93	[720146] Docketing statement filed by Colorado Republican, Douglas Jones. Original and 4 copies c/s: y. (afw) [93-1433]
11/8/93	[721059] Notice received from Appellant Colorado Republican that a transcript is not necessary for this appeal. Notice due that record is complete 11/22/93 for Edward W. Nottingham (afw) [93-1433]
11/8/93	[721436] Filed notice record is complete 11/8/93. (afw) [93-1433 93-1434]

DATE	PROCEEDINGS
11/9/93	[721525] Notice of appearance filed by Carol A. Laham in 93-1433, Thomas W. Kirby in 93-1433, Jan Witold Baran in 93-1433, Carol A. Laham in 93-1434, Thomas W. Kirby in 93-1434, Jan Witold Baran in 93-1434 as attorney for Colorado Republican in 93-1433. Douglas Jones in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434. CERT. OF INTERESTED PARTIES (y/n): n (mbm) [93-1433 93-1434]
11/10/93	[721073] Case referred for settlement conferencing. (afw) [93-1433]
11/10/93	[721529] Notice of appearance filed by Richard B. Bader in 93-1433, Vivien Clair in 93-1433, Kenneth E. Kellner in 93-1433, Lawrence M. Noble in 93-1433 as attorney for Federal Election in 93-1433. CERT. OF INTERESTED PARTIES (y/n): (mbm) [93-1433]
11/15/93	[721439] Cross-appeal schedule set. A/Pet appendix due 12/20/93 for Douglas Jones in 93-1433, for Colorado Republican in 93-1433, for Douglas Jones in 93-1434, for Colorado Republican in 93-1434 (afw) [93-1433 93-1434]
11/23/93	[725454] Case settlement conferencing terminated. (afw) [93-1433 93-1434]
12/13/93	[728884] Notice of appearance filed by Rita A. Reimer, Richard B. Bader, Lawrence M. Noble as attorneys for Federal Election in 93-1433. CERT. OF INTERESTED PARTIES (y/n): y. (pdw) [93-1433]
12/27/93	[732161] First brief on cross-appeal filed by Colorado Republican, Douglas Jones in 93-1433, 93-1434. Original and 7 copies. c/s: y. Served on 12/20/93. Oral Argument? y. 2nd cross-appeal brief due 1/24/94 for Federal Election in 93-1433, for Federal Election in 93-1434 (pdw) [93-1433 93-1434]

DATE	PROCEEDINGS
12/27/93	[732172] Appendix filed by Colorado Republican Douglas Jones in 93-1433, 93-1434. Original and 1 copy (2 volumes). c/s: y. (pdw) [93-1433 93-1434]
1/19/94	[736699] Appellee's motion to extend time to file second brief on cross-appeal until 2/7/94 [93-1433, 93-1434] filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 3 copies. c/s: y (mbm) [93-1433 93-1434]
1/20/94	[736700] Order filed by RLH granting Appellee/ Respondent motion to extend time to file brief [736699-1] in 93-1433, 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
2/8/94	[743586] Second brief on cross-appeal filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 7 copies. Served on 2/7/94 Oral Argument? y (mbm) [93-1433 93-1434]
3/17/94	[751948] Third brief on cross-appeal filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Douglas Jones in 93-1434, Colorado Republican in 93-1434. Original and 7 copies. Served on 3/14/94 (mbm) [93-1433 93-1434]
3/29/94	[754600] Cross-appeal reply brief filed by Federal Election in 93-1433, 93-1434. Original and 7 copies. (kc) [93-1433 93-1434]
9/21/94	[796183] Hearing set for November 1994 Session, at Denver (sls) [93-1433 93-1434 93-1498 94-1040 94-1051, 94-1060 94-1061 94-1066 94-1069 94-1217]
11/4/94	[807426] Appellant's supplemental authority filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434 and submitted to panel. Original and 7 copies. c/s: y (mbm) [93-1433 93-1434]
11/14/94	[809301] Case argued and submitted to Judges Henry, Logan, Reed. (sls) [93-1433 93-1434]

DATE	PROCEEDINGS
12/12/94	[816655] Appellee's supplemental authority filed by Federal Election in 93-1433. Original and. c/s: y (fg) [93-1433 93-1434]
12/13/94	[816664] Appellee's supplemental authority submitted to panel. (fg) [93-1433 93-1434]
6/23/95	[867629] Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Henry; Logan, authoring judge; Reed. [93-1433, 93-1434] (mbm) [93-1433 93-1434]
8/7/95	[875848] Petition for rehearing in banc [93-1433] filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433. Original and 14 copies. c/s: y (mbm) [93-1433]
8/7/95	[875849] Document [875848-1] Petition for rehearing in banc filed by Appellant Douglas Jones, Colorado Republican submitted to panel. (mbm) [93-1433]
8/11/95	[877125] Order filed by Judge(s) Henry, Logan, Reed - response to petition for rehearing due 8/21/95 for Federal Election in 93-1433, for Federal Election in 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
8/21/95	[879331] Response filed by Federal Election in 93-1433 order Response due Original and 15 copies. c/s: y (fg) [93-1433]
8/21/95	[879332] Response filed by Federal Election in 93-1433, Federal Election in 93-1434 Document [879331-1] response Null Relief Code filed by Appellee Federal Election in 93-1433, Document [877125-1] order Response due filed, Robert H. Henry, James K. Logan, Edward C. Reed Jr. in 93-1434 order Response due submitted to panel. (fg) [93-1433 93-1434]

DATE	PROCEEDINGS
9/6/95	[882631] Order filed by Judge(s) Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Logan, Reed denying Petition for rehearing in banc [875848-1] in 93-1433, denying Petition for rehearing in banc [875853-1] in 93-1434. Judges Baldock, Ebel and Kelly voted to grant, Judge Lucero is recused. (mbm) [93-1433 93-1434]
9/14/95	[884426] Mandate issued to district court. Mandate receipt due 10/16/95 in 93-1433, in 93-1434 (afw) [93-1433 93-1434]
9/18/95	[885654] Mandate receipt filed. (afw) [93-1433 93-1434]
10/2/95	[889596] Petition for writ of certiorari filed on 9/21/95 by Appellants Douglas Jones and Colorado Republican in 93-1433, and Appellees Douglas Jones and Colorado Republican in 93-1434. Supreme Court Number 95-489. (afw) [93-1433 93-1434]
11/22/95	[900957] Case filed closed. 11/21/97 in 93-1434, in 93-1433 (das) [93-1433 93-1434]

DATE	PROCEEDINGS
	Proceedings in Case No. 93-1434
11/1/93	[718348] Civil case docketed. Preliminary record filed. Transcript order form due 11/12/93 for Roxie English pursuant to R.42.1. Docketing statement due 11/12/93 for Federal Election. Notice of appearance due 11/12/93 for Douglas Jones, for Colorado Republican, for Federal. (pdw) [93-1434]
11/5/93	[720138] Docketing statement filed by Federal Election. Original and 4 copies c/s: y. (afw) [93-1434]
11/5/93	[720141] Notice received from Appellant Federal Election that a transcript is not necessary for this appeal. Notice due that record is complete 11/15/93 for Edward W. Nottingham (afw) [93-1434]
11/8/93	[721436] Filed notice record is complete 11/8/93. (afw) [93-1433 93-1434]
11/9/93	[721525] Notice of appearance filed by Carol A. Laham in 93-1433, Thomas W. Kirby in 93-1433, Jan Witold Baran in 93-1433, Carol A. Laham in 93-1434, Thomas W. Kirby in 93-1434, Jan Witold Baran in 93-1434 as attorney for Colorado Republican in 93-1433, Douglas Jones in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434. CERT OF INTERESTED PARTIES (y/n): n (mbm) [93-1433 93-1434]
11/10/93	[721074] Case referred for settlement conferencing. (afw) [93-1434]
11/10/93	[721520] Letter re: correction to docketing statement (see correspondence side of file) filed by Appellant Federal Election in 93-1434. Original and 0 copies. c/s: y (mbm) [93-1434]

DATE	PROCEEDINGS
11/15/93	[721439] Cross-appeal schedule set. A/Pet appendix due 12/20/93 for Douglas Jones in 93-1433, for Colorado Republican in 93-1433, for Douglas Jones in 93-1434, for Colorado Republican in 93-1434 (afw) [93-1433 93-1434]
11/23/93	[725454] Case settlement conferencing terminated. (afw) [93-1433 93-1434]
12/14/93	[728472] Order filed by RLH notice of appearance form due 12/27/93 for Federal Election. Parties served by mail. (afw) [93-1434]
12/22/93	[730729] Notice of appearance filed by Rita A. Reimer in 93-1434, Richard B. Bader in 93-1434, Lawrence M. Noble in 93-1434 as attorney for Federal Election in 93-1434. CERT. OF INTERESTED PARTIES (y/n): y. Attorney Kenneth E. Kellner for Federal Election in 93-1434, attorney Stephen E. Hershkowitz for Federal Election in 93-1434 terminated. (mbm) [93-1434]
12/27/93	[732161] First brief on cross-appeal filed by Colorado Republican, Douglas Jones in 93-1433, 93-1434. Original and 7 copies. c/s: y. Served on 12/20/93. Oral Argument? y. 2nd cross-appeal brief due 1/24/94 for Federal Election in 93-1433, for Federal Election in 93-1434 (pdw) [93-1433 93-1434]
12/27/93	[732172] Appendix filed by Colorado Republican Douglas Jones in 93-1433, 93-1434. Original and 1 copy (2 volumes). c/s: y. (pdw) [93-1433 93-1434]
1/19/94	[736699] Appellee's motion to extend time to file second brief on cross-appeal until 2/7/94 [93-1433, 93-1434] filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 3 copies. c/s: y (mbm) [93-1433 93-1434]

DATE	PROCEEDINGS
1/20/94	[736700] Order filed by RLH granting Appellee/ Respondent motion to extend time to file brief [736699-1] in 93-1433, 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
2/8/94	[743586] Second brief on cross-appeal filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 7 copies. Served on 2/7/94 Oral Argument? y (mbm) [93-1433 93-1434]
3/17/94	[751948] Third brief on cross-appeal filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Douglas Jones in 93-1434, Colorado Republican in 93-1434. Original and 7 copies. Served on 3/14/94 (mbm) [93-1433 93-1434]
3/29/94	[754600] Cross-appeal reply brief filed by Federal Election in 93-1433, 93-1434. Original and 7 copies. (kc) [93-1433 93-1434]
9/21/94	[796183] Hearing set for November 1994 Session, at Denver. (sls) [93-1433 93-1434 93-1498 94-1040, 94-1051, 94-1060 94-1061 94-1066, 94-1069 94-1217]
11/4/94	[807426] Appellant's supplemental authority filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434 and submitted to panel. Original and 7 copies. c/s: y (mbm) [93-1433 93-1434]
11/14/94	[809301] Case argued and submitted to Judges Henry, Logan, Reed. (sls) [93-1433 93-1434]
12/12/94	[816655] Appellee's supplemental authority filed by Federal Election in 93-1433. Original and. c/s: y (fg) [93-1433 931434]
12/13/94	[816664] Appellee's supplemental authority submitted to panel. (fg) [93-1433 93-1434]

DATE	PROCEEDINGS
6/23/95	[867629] Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Henry; Logan, authoring judge; Reed. [93-1433, 93-1434] (mbm) [93-1433 93-1434]
8/7/95	[875853] Petition for rehearing in banc [93-1434] filed by Douglas Jones in 93-1434, Colorado Republican in 93-1434. Original and 14 copies. c/s: y (mbm) [93-1434]
8/7/95	[875854] Document [875853-1] Petition for rehearing in banc filed by Appellee Douglas Jones, Colorado Republican submitted to panel. (mbm) [93-1434]
8/11/95	[877125] Order filed by Judge(s) Henry, Logan, Reed response to petition for rehearing due 8/21/95 for Federal Election in 93-1433, for Federal Election in 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
8/21/95	[879332] Response filed by Federal Election in 93-1433, Federal Election in 93-1434 Document [879331-1] response Null Relief Code filed by Appellee Federal Election in 93-1433, Document [877125-1] order Response due filed, Robert H. Henry, James K. Logan, Edward C. Reed Jr. in 93-1434 order Response due submitted to panel. (fg) [93-1433 93-1434]
8/21/95	[879333] Response filed by Federal Election in 93-1434 order Response due Original and 15 copies. c/s: y (fg) [93-1434]
9/6/95	[882631] Order filed by Judge(s) Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Logan, Reed denying Petition for rehearing in banc [875848-1] in 93-1433, denying Petition for rehearing in banc [875853-1] in 93-1434. Judges Baldock, Ebel and Kelly voted to grant, Judge Lucero is recused. (mbm) [93-1433 93-1434]

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9/18/95	[885654] Mandate receipt filed. (afw) [93-1433 93-1434]
10/2/95	[889596] Petition for writ of certiorari filed on 9/21/95 by Appellants Douglas Jones and Colorado Republican in 93-1433, and Appellees Douglas Jones and Colorado Republican in 93-1434. Supreme Court Number 95-489. (afw) [93-1433 93-1434]
11/22/95	[900957] Case file closed. 11/21/97 in 93-1434, in 93-1433 (das) [93-1433 93-1434]

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 89 N 1159

FEDERAL ELECTION COMMISSION,
Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

Aug. 30, 1993

ORDER AND MEMORANDUM OF DECISION

NOTTINGHAM, District Judge.

This case involves alleged violations of the Federal Elections Campaign Act of 1971, as amended, 2 U.S.C.A. §§ 431-456 (West 1985) (the "Act"). Plaintiff Federal Election Commission sued Defendant Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones, claiming that defendants had failed to report a certain payment as an "expenditure," as required by 2 U.S.C.A. § 441a(d)(3). Plaintiff seeks declaratory, civil, and injunctive relief under the Act. The matter comes before the court on (1) "Defendants' Motion for Summary Judgment" filed May 15, 1990, and (2) "Plaintiff's Motion for Summary Judgment" filed July 6, 1990. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1976).

FACTS

Defendant Colorado Republican Federal Campaign Committee (the "Committee") is an unincorporated political association. It works to advance the goals and values of the Republican Party in the State of Colorado. (Defs.' Statement of Undisputed Facts and Supp. Exs. ¶ 1 [filed May 15, 1990] [hereinafter "Defs.' Statement"], *admitted at* Pl.Fed.Election Comm'n's Resp. to Defs.' Statement of Undisputed Facts and Supp. Exs. ¶ 1 [filed July 6, 1990] [hereinafter "Pl.'s Resp. to Defs.' Statement"]) It is the federally-registered committee for the Republican Party in Colorado and is therefore (as it acknowledges) subject to the Act.

Section 441(a)(3) of the Act limits the amount which such a committee may expend "in connection with the general election campaign of a candidate for federal office." 2 U.S.C.A. § 441a(d)(3). In 1986, the Committee assigned its yearly right to make expenditures under the Act to the National Republican Senatorial Committee. (Defs.' Statement ¶ 16, Ex. 4 [Defs.' Resp. to Pl.'s Req. for Admis.], *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 15-16.) The Committee thereafter paid $15,000 for a radio advertisement, entitled "Wirth Facts #1" [hereinafter "the Advertisement"], the text of which follows:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicans who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for Senate, but he doesn't have a right to change the facts.

(Defs.' Statement ¶ 7, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee devised "Wirth Facts #1" as a response to a series of television advertisements featuring then-Congressman Wirth. These advertisements were sponsored by the Committee for Tim Wirth, Inc. (Pl.Fed. Election Comm'n's Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ.J. and in Opp'n to Defs.' Summ.J.Mot. at 6 [filed July 6, 1990] [hereinafter "Pl.'s Mot."].) The Advertisement ran between April 4 and 13, 1986, four months before the August Democratic primary and seven months before the November general election. (Defs.' Statement ¶¶ 4-6, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee is required by section 434(b)(4)(H)(iv) to make quarterly or monthly reports which must contain any section 441a(d)(3) expenditures. *See* 2 U.S.C.A. § 434(a)(4)(A)(i). In the Committee's quarterly report, it listed the $15,000 paid for the Advertisement as an operating expense—not as a section 441a(d)(3) expenditure—and identified it as "voter information to Colorado voters—advertising." (Defs.' Statement, Ex. 12 at 3 [Defs.' Br. for Fed.Election Comm'n Proceedings].) On June 12, 1986, the Colorado Democratic Party filed an administrative complaint with the Federal Election Commission ("Commission"), alleging, inter alia, that defendants' expenditure for the Advertisement violated the Act. On January 10, 1989, the Commission determined there was probable cause to believe defendants had violated sections 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f) of the Act. When settlement negotiations failed, the Commission instituted this civil action.

The parties filed cross-motions for summary judgment on plaintiff's claim that defendants failed to comply with the Act. Defendants maintain section 441a(d)(3) does not apply to the money paid for the Advertisement because it was not an expenditure "in connection with" the

general election of a candidate for federal office. (Defs.' Mem. in Supp. of Defs.' Mot. for Summ.J. at 6-7 [filed May 15, 1990] [hereinafter "Defs.' Mot."].) Defendants also assert a counterclaim alleging that section 441a(d)(3) is unconstitutional. No material facts are in dispute. Because I find that plaintiff has failed to demonstrate the Advertisement was "in connection with" the general elecion of a candidate for federal office. I grant defendants' motion for summary judgment and deny plaintiff's motion. I therefore need not, and do not, reach defendants' challenge to section 441a(d)(3)'s constitutionality.

ANALYSIS

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted where there is "no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id.*, 477 U.S. at 321, 106 S.Ct. at 2552. Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. A triable isue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir.1990). If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and

the moving party is entitled to summary judgment as a matter of law. *Anderson*, 477 U.S. at 250, 106 S.Ct. 2511.

Section 441(d)(3) of the Act is at the center of this dispute. It provides:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure *in connection with the general election campaign of a candidate for Federal office* in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator . . ., the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State . . .; or
>
> (ii) $20,000. . . .

2 U.S.C.A. § 441a(d)(3) (emphasis added). Because the Committee assigned the full amount of expenditures permitted by section 441a(d)(3) to the National Republican Senatorial Committee, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39-40, 102 S.Ct. 38, 46, 70 L.Ed.2d 23 (1981) [hereinafter *DSCC*], it no longer had the right to make section 441a(d)(3) expenditures. As a consequence, the Committee's expenditure of $15,000 for the Advertisement, if made "in connection with" the general election campaign, was a violation of the spending limits established by section 441a(d)(3).

Two types of expenditures are regulated under the Act: coordinated and independent. A coordinated expenditure is one made in cooperation with, or with the consent of a candidate, his agents, or an authorized committee of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S.Ct. 612, 647 n. 53, 46 L.Ed.2d 659 (1976). An inde-

pendent expendituure is one made without the knowledge or permission of a candidate, his agent, or his campaign committee. *Id.* *See* 2 U.S.C.A. § 431(17). Coordinated expenditures are considered "contributions" under section 441a(a)(7)(B)(i); as such, they may be more freely limited than independent expenditures. *Buckley*, 424 U.S. at 48, 96 S.Ct. at 647-48; *Federal Election Comm'n v. National Conservatice Political Action Comm.*, 470 U.S. 480, 491, 105 S.Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) [hereinafter *NCPAC*]. In *Buckley*, the Court upheld as constitutional the limitations on contributions to candidates and struck down as unconstitutional limitations on independent expenditures. *NCPAC*, 470 U.S. at 491, 105 S.Ct. at 1465. *See also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260, 107 S.Ct. 616, 630, 93 L.Ed.2d 539 (1986) [hereinafter *MCFL*] ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 194, 196-97, 101 S.Ct. 2712, 2720, 2724-25, 69 L.Ed.2d 567 (1981) (same).

Expenditures by party committees are considered to be coordinated expenditures subject to the monetary limits of section 441a(d). *DSCC*, 454 U.S. at 27 n. 1, 102 S.Ct. at 40. n.1.[1] Party committees have been deemed incapable of making independent expenditures in connection with the campaigns of their party's candidates. *DSCC*, 454 U.S. at

[1] Defendants point to a passage in *Buckley* which classifies 2 U.S.C.A. § 608(f) (West 1970) (recodified as section 441a[d]) as an "expenditure ceiling," as opposed to a contribution limitation. According to defendants, this reference suggests the Court considered section 441a(d) to regulate independent expenditures. It is unclear how referring to section 441a(d) as an "expenditure" limitation necessarily suggests the section regulates *independent* expenditures. In light of the Court and Commission's other pronouncements, and the fact that this reference is dicta, *see Buckley*, 424 U.S. at 58 n. 66-67, 96 S.Ct. at 653 n. 66-67, I do not find this singular reference persuasive.

27, n. 1, 102 S.Ct. at 40 n. 1. *See also* FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985); FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984).

The Commission has the "primary and substantial responsiblity for administering and enforcing the Act," and has "extensive rulemaking and adjudicative powers." *Buckley*, 424 U.S. at 109-10, 96 S.Ct. at 677-78. When interpreting the Act, the Commission's interpretation is presumptively entitled to deference. *DSCC*, 454 U.S. at 38, 102 S.Ct. at 45. The Commission has, by regulation, forbidden independent expenditures by national and state party committees. *See* 11 C.F.R. § 110.7(B)(4) (1981).

Defendants suggest that because no Republican candidate had been nominated, the expenditure was necessarily "independent," not "coordinated." However, for purposes of determining whether an expenditure is coordinated or independent, it is irrelevant whether a candidate has been nominated at the time the expenditure is made. *See* FEC Advisory Opinion 1985-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984). "[N]othing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." *Id.* Organizations whose major purpose is the nomination or election of a candidate "are, by definition, campaign related," *Buckley*, 424 U.S. at 80, 96 S.Ct. at 663, regardless of whether a specific candidate has been nominated. Based on Supreme Court precedent and the Commission's interpretation of the statute, I find that the Committee's expenditure was coordinated. It was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated.

The Committee's expenditure would nevertheless not be subject to section 441a(d)(3) limitations unless the ex-

penditure was made "in connection with" the general election compaign of a candidate for federal office. No controlling or persusaive authority has interpreted the phrase "in connection with" in the context of section 441a (d)(3). The Court, however, has interpreted the phrase "in connection with" in the context of section 441b, which, like section 441a(d)(3), regulates contributions and expenditures. In *MCFL*, the Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249, 107 S.Ct. at 623. *See also Buckley*, 424 U.S. at 80, 96 S.Ct. at 663. "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Sorenson v. Secretary of Treasury of the United States*, 475 U.S. 851, 860, 106 S.Ct. 1600, 1606, 89 L.Ed.2d 855 (1986); *Barnson v. United States*, 816 F.2d 549 (10th Cir.), *cert. denied*, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987) (when the same words are used in dicerent sections of the same law, they will be given the same meaning).

This rule of statutory construction is usually followed where different parts of the same act have a similar purpose, as do sections 441a(d)(3) and 441b. Both sections 441a(d)(3) and 441b are intended to regulate contributions and expendiutres of multi-person organizations. While section 441a(d) regulates expendiutures by national committees, state committees, or subordinate committees of the state committees, section 441b regulates expenditures by national banks, corporations, or labor organizations. Since I examine the statute as a whole, I find the Court's interpretation of "in connection with" in the context of section 441b to be persuasive of my interpretation of the same words in section 441a(d)(3).

Plaintiff urges the court to adopt the Commission's interpretation of "in connection with" which would require

the Advertisement to contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, 1 Fed.Election Campaign Fin.Guide (CCH) ¶ 5819 (July 18, 1985). According to plaintiff, section 441b differs significantly from section 441a(d)(3), in that 441b regulates independent expenditures, whereas section 441a(d)(3) regulates coordinated expenditures. Although *Buckley* acknowledges that coordinated expenditures may be more freely regulated than independent expenditures, it does not follow that the identical words, when used with reference to coordinated expenditures, should be given a more expansive interpretation.

The Supreme Court's decision in *Buckley* suggests just the opposite. When examining the intrusiveness of the statute's regulations on first amendment freedoms, the Court found that a limitation on coordinated expenditures was justified in order to stem "the reality or appearance of corruption in the electoral process." *Buckley*, 424 U.S. at 46, 96 S.Ct. at 647-48. Although the Court found the justification for regulating coordinated expenditures outweighed the infringement on the First Amendment, this conclusion does not create a carte blanche for expansive regulation of coordinated expenditures. On the contrary, the fact that section 441a(d)(3) implicates first amendment freedoms argues for adoption of the more narrowly defined "express advocacy" interpretation in order to minimize intrustions.[2] Moreover, as *Buckley* notes, the limita-

[2] A narrow interpretation of the words "in connection with" also addresses the constitutional concerns raised by defendants. Defendats contend that if all expenditures by state committees were deemed contributions subject to section 441a(d)(3), then they would not be free to speak in favor of their candidates. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ.J. and in Reply to Pl.'s Opp'n to Defs.' Mot. for Summ.J. at 4 [filed July 25, 1990] [hereinafter "Defs.' Reply"].) By adopting a more narrowly defined interpretaiton of "in connection with," state political committees remain free to engage in speech which does not expressly advocate the election of its candidates.

tion on contributions by state political committees "[r]ather than undermining freedom of association, . . . enhances the opportunity of bona fide groups to participate in the election process." *Buckley,* 424 U.S. at 33, 96 S.Ct. at 642. Given that the effect of the regulation is to enhance the political freedom of committees, I find that the "express advocacy" standard, which is a less intrusive limitation on a committee's freedom, is consistent with the Act's purpose. I do not find any compelling justification within the Commission's advisory opinion, nor in plaintiff's argument, for expanding *Buckley*'s carefully circumscribed exception to its prohibition against regulation of freedom of speech.

The Commission does not point to any other section of the statute where the courts have given the language "in connection with" the expansive interpretation the Commission advocates in this case. In fact, the courts have consistently interpreted "in connection with" as requiring "express advocacy." *See Federal Election Comm'n v. Furgatch,* 807 F.2d 857, 864 (9th Cir.), *cert. denied,* 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987); *Federal Election Comm'n v. Central Long Island Tax Reform,* 616 F.2d 45, 53 (2nd Cir.1980).[3] In *Orloski v. Federal Election Commission,* 795 F.2d 156 (D.C.Cir.1986), the

[3] In *United States v. International Union UAW-CIO,* 352 U.S. 567, 587, 77 S.Ct. 529, 550, 1 L.Ed.2d 563 (1957), the Court interpreted "in connection with" in the context of a predecessor to the current Act, which prohibited corporate or union contributions or expenditures to be used "in connection with" any election for federal office. *Id.,* 352 U.S. at 568, 77 S.Ct. at 530. The Court held that the "in connection with" found in the statute was understood to proscribe "the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party." *Id.,* 352 U.S. at 587, 77 S.Ct. at 550. It is unclear from this language whether the Court was adopting a different interpretation of "in connection with" or merely applying the "express advocacy" standard. Plaintiff does not explain how this language differs materially from the "express advocacy" standard. Since no court has subsequently adopted the language used in *International Union UAW-CIO,* I decline to do so in this case.

Commission itself advocated the adoption of the "express advocacy" interpretation of "in connection with" in the context of section 441b(a). In adopting the Commission's interpretation, the D.C. Circuit noted:

> [T]he FEC's interpretation is consistent with *Buckley,* in which the Supreme Court held that under the first amendment, the phrases "for the purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable candidate," a definition that was subsequently incorporated into the Act. *See* 2 U.S.C. § 431(17). To be sure, the Court limited these definitions to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions, *see Buckley,* 424 U.S. at 78-80, 96 S.Ct. at 663-64. Nonetheless the fact that the Court in *Buckley* formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical, reasonable, and consistent with the overall statutory framework. *The fact that the FEC adopted this interpretation for all relevant statutory provisions, even where not constitutionally required, only adds to its reasonableness for it enhances the consistency and evenhandedness with which the FEC ultimately administers the Act.*

Orloski, 795 F.2d at 166-67 (emphasis added). *See also* FEC Advisory Opinion 1978-46, 1 Fed.Election Campaign Fin.Guide (CCH) ¶ 5348 (Oct. 5, 1978) (suggesting that section 441a(d) requires "express advocacy").

The "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *DSCC,* 454 U.S. at 35, 102 S.Ct. at 44; *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 287 n. 5, 98 S.Ct. 566, 573 n. 5, 54 L.Ed.2d 538 (1978). I do not find the Com-

mission's suggested interpretation of "in connection with" to be entitled to deference where it is neither thorough nor consistent with either its own previous rulings or ths courts' holdings. I conclude that "express advocacy" is required in order for a coordinated expenditure to be "in connection with" the general election campaign of a candidate for federal office under section 441a(d)(3).

Having made this determination, I must decide whether the Advertisement constituted "express advocacy." The Court has adopted a bright-line test for identifying speech which constitutes "express advocacy" recognizing that:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42, 96 S.Ct. at 645. *See Furgatch*, 807 F.2d at 860; *Federal Election Comm'n v. National Organization for Women*, 713 F.Supp. 428, 432 (D.D.C. 1989). The Court defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.'" *Buckley*, 424 U.S. at 46 n. 52, 96 S.Ct. at 647 n. 52. Speech is "advocacy" if it "presents a clear plea for specific action, and . . . it must be clear what action is advocated." *Furgatch*, 807 F.2d at 864. Speech which is merely informative would not be considered "advocacy." *Id.* When determining whether speech constitutes "express advocacy," the focus is on the actual wording used. *Buckley*, 424 U.S. at 42, 96 S.Ct. at 646.

The Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests,

the Advertisement contains an indirect plea for action. The Advertisement concludes with "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the Advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch*.

According to plaintiff, the surrounding circumstances suggest the Advertisement was, in fact, a plea for action. The Advertisement identified Wirth by name and position, referred to his senate candidacy, responded to Wirth's own campaign advertisements, and said "paid for by the Colorado Republic State Central Committee." (Pl.'s Mot. at 15.) At the time the Advertisement ran, plaintiff maintains, Wirth was the only credible announced Democratic candidate for Senate. *Id.* In addition, the public "knew" the sponsor of the Advertisement, *i.e.*, the Republican party, would eventually nominate a candidate. Thus, the Advertisement implicitly urged the public both to vote against Wirth and to support whomever the Republican candidate would be. Plaintiff also points to contemporaneous press statements of Howard "Bo" Callaway, then Chairman of the Colorado Republican Party, concerning the state committee's general purpose which allegedly leave "no doubt that the intent of the ad was to attack Mr. Wirth's candidacy for the Senate." (Pl.'s Mot. at 10-11, 17-18.)

I do not believe this type of indirect urging constitutes "express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation. *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471 (1st Cir.1991). In adopting a bright-line approach, the Court noted the difficulty in interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both

> of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43, 96 S.Ct. at 646 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 325, 89 L.Ed. 430 [1945]). In adopting the "express advocacy" standard, the Court sought to protect issue advocacy. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential. . . . Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14-15, 96 S.Ct. at 632. Trying to determine whether the surrounding circumstances, coupled with the implications of the Advertisement, constitute "express advocacy" leads to the type of semantic dilemma which the Court sought to avoid by adopting a bright-line rule. I decline to blur *Buckley*'s bright-line rule by interpreting the Advertisement's criticism of Wirth as "express advocacy." Viewing the facts in the light most favorable to plaintiff, I find that the Advertisement does not call for the type of "express advocacy" required by *Buckley*. Because I conclude that no reasonable trier of fact could find for plaintiff on the basis of the evidence presented, defendants are entitled to summary judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

With regard to plaintiff's motion for summary judgment, the analysis of whether the Advertisement constitutes "express advocacy" is the same. Defendants allege that the Advertisement neither contains a direct plea for action, nor conveys support for a particular candidate. According to defendants, the Advertisement simply informed the public about the political record of an incumbent Colorado congressman; it did not advocate voting for or against any political candidate. (Defs.' Mot. at 7.) In addition, the Advertisement was broadcast seven months before the general election—before either party had chosen its candidate. (Defs.' Reply at 10.) Defendants Claim Wirth's senate candidacy was referenced in the Advertisement only for the purpose of identifying his statements. (Defs.' Reply at 9.) Plaintiff fails to adequately rebut these claims. Accordingly, plaintiff's motion for summary judgment is denied.

Conclusion

Because I find that the expenditure for the Advertisement was not "in connection with" the general election of a candidate for federal office, it was not subject to section 441a(d)(3) limitations and did not violate the Act. Since I am able to resolve the dispute on statutory grounds, I do not reach defendants' challenge to the constitutionality of section 441a(d)(3). Defendants cannot avoid this result by posturing the constitutional issue as an independent counterclaim. It is therefore

ORDERED as follows:

(1) Plaintiff's motion for summary judgment is DENIED; and

(2) Defendants' motion for summary judgment is GRANTED. All claims against defendants are dismissed. Defendants' counterclaim is DISMISSED as moot.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 93-1433, 93-1434

FEDERAL ELECTION COMMISSION,
Plaintiff/Counter-Defendant/Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, Douglas Jones,
Defendants/Counter-Claimants/Appellants/Cross-Appellees.

June 23, 1995

Before HENRY and LOGAN, Circuit Judges, and REED, District Judge.*

LOGAN, Circuit Judge.

The Federal Election Commission (FEC) appeals from the dismissal on the merits of its underlying suit filed against the Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones (collectively the Committee) alleging violations of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-442. The Committee cross-appeals from the dismissal as moot of its counterclaim challenging the constitutionality

* The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.

of the FECA expenditure limitations. We hold that the Committee expendiutres at issue did violate the coordinated expenditure limitation in 2 U.S.C. § 441a(d)(3). We also reach the constitutional issue and hold that § 441a (d)(3) does not violate the Committee's First Amendment rights.

This action stems from the 1986 United States senatorial campaign in Colorado, and pre-election spending by the Committee. In January 1986, then-Congressman Timothy E. Wirth had registered with the FEC as a candidate for the Democratic nomination for the U.S. Senate. Several months later, but before either political party had nominated senatorial candidates, the Committee spent $15,000 for a radio advertisement directed at Wirth's announced candidacy ("Wirth Facts #1").[1] This spending prompted the Colorado Democratic Party's administrative complaint with the FEC alleging that it was an "expenditure in connection with" the general election campaign of a candidate for federal office in violation of the spending limits set out in FECA § 441a(d)(3).

The FEC made a probable cause determination that the Committee violated the FECA. When the parties were unable to reach a settlement the FEC filed suit. The FEC alleged that the Committee failed to report the amount spent on the anti-Wirth publicity as an "expendi-

[1] Wirth Facts #1 read:

> Paid for by the Colorado Republican State Central Committee.
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

Jt.App. 95-96.

ture in connection with" the general election campaign, in violation of FECA §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). The Committee counterclaimed, alleging that the FECA was an unconstitutional infringement on its First Amendment rights. In ruling on the parties' cross motions for summary judgment, the district court dismissed the underlying action after finding no FECA violation, and dismissed the counterclaim as mooted by its merits ruling. These appeals followed.

I

We first address whether the district court correctly concluded that the Committee did not violate the FECA. We review de novo a district court's grant of summary judgment using the same legal standards as the district court. *Clark v. Haas Group, Inc.*, 958 F.2d 1235, 1237 (10th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992).

A

The FECA regulates contributions made to federal candidates and political parties, and expenditures made by persons and political committees. It also imposes record-keeping and reporting requirements. The Committee acknowledges that it is subject to the FECA as a federally registered committee of the Colorado Republican Party.

The statute limits monetary contributions and expenditures by state and national political party committees as follows:

> (d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a

> political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> * * * *
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> > (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
> >
> > (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
> >
> > (ii) $20,000.

2 U.S.C. § 441a(d)(1) and (3). A state political party committee may assign to a designated agent (including a national party committee) the right to make the expenditures the state party could have made. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41-43, 102 S.Ct. 38, 46-48, 70 L.Ed.2d 23 (1981) (*DSCC*). Here the Committee expended funds on the anti-Wirth publicity after assigning to the National Republican Senatorial Committee the authority to make all of the expenditures—$103,248—it was allowed under § 441a(d)(3) for the 1986 U.S. Senate election. *See* I Jt.App. 4, 14; II *id.* 473. The Committee did not report the $15,000 anti-Wirth publicity expense under 2 U.S.C.

§ 434(b)(4)(H)(iv),[2] instead characterizing it as an expense for "Voter Information to Colorado Voters—Advertising." II App. 478, ¶ A. The narrow issue is whether the anti-Wirth publicity expense was an "expenditure in connection with the general election campaign" pursuant to § 441a(d)(3) and should have been reported accordingly. If so, the Committee exceeded the § 441a(d)(3) monetary ceiling.

As relevant here, the FECA addresses two types of campaign expenditures: independent and coordinated.[3] A coordinated expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S.Ct. 612, 648 n. 53, 46 L.Ed.2d 659 (1976). *See also* 11 C.F.R. § 110.7(b)(4). Because political parties are considered incapable of making independent expenditures, the district court correctly found that the anti-Wirth publicity expense was a coordinated

[2] 2 U.S.C. § 434(b)(4)(H)(iv) reads in part:

> (b) Contents of reports
>
> Each report under this section shall disclose—
>
> (4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:
>
> (H) for any political committee other than an authorized committee—
>
> (i) contributions made to other political committees;
>
> (ii) loans made by the reporting committees;
>
> (iii) independent expenditures;
>
> (iv) expenditures made under section 441a(d) of this title; and
>
> (v) any other disbursements.

[3] An independent expenditure is "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

expenditure. *See DSCC*, 454 U.S. at 29 n. 1, 102 S.Ct. at 41 n. 1. If that spending was an "expenditure[] in connection with" the campaign it was subject to the monetary limitations at § 441a(d). *Id.* The district court concluded that the Committee's coordinated expenditure on the anti-Wirth publicity was not made in connection with the 1986 Colorado senatorial campaign, and therefore was not subject to the § 441a(d)(3) limits.

B

The FECA does not clearly manifest the meaning Congress intended to attach to the "expenditures in connection with" language in § 441a(d)(3) Acknowledging that there were no controlling or persuasive cases interpreting that section, the district court relied upon *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*), and its interpretation of FECA § 441b. Section 441b[4] restricts the

[4] 2 U.S.C. § 441b provides in relevant part as follows:

> (a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.
>
> . . . .

[Continued]

contributions and expenditures of national banks, corporations, or labor organizations. The Supreme Court in *MCFL* considered whether Massachusetts Citizens for Life, Inc., a nonprofit, nonstock corporation, by financing a newsletter urging voter support for identified pro-life candidates, violated the "independent spending" limitations in in § 441b. *Id.* at 241, 107 S.Ct. at 619. Interpreting the term "expenditure in connection with any election" the Court held that the expenditure "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.* at 249, 107 S.Ct. at 623.

MCFL relied upon the *Buckley* opinion's interpretation of a limitation on independent expenditures "relative to" a clearly identifiable candidate. To avoid invalidating on vagueness grounds what was then FECA § 608(e)(1), the *Buckley* Court held the term encompassed only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate

[4] [Continued]

(b)(2) For purposes of this section and section 79*l*(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

for federal office." *Buckley*, 424 U.S. at 44, 96 S.Ct. at 646-47. The opinion clarified in a footnote that this construction would restrict the application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* n. 52. *MCFL* adopted the same definition, referencing the same footnote, for purposes of § 441b's independent spending limitation. 479 U.S. at 249, 107 S.Ct. at 623.

The district court, noting the identity of the "expenditures in connection with" language in § 441b and in § 441a(d)(3), concluded that the anti-Wirth publicity was not express advocacy and therefore not governed by the § 441a(d)(3) limitations. The district court relied in part on a common law rule of statutory construction that identical words used in different sections of the same statute generally should be given the same meaning. However, the Supreme Court has also stated that "the presumption readily yields to the controlling force of the circumstance that words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, 55 S.Ct. 50, 51, 79 L.Ed. 211 (1934).

Further, we cannot overlook a significant distinction between *Buckley* and *MCFL* and the instant case. The *Buckley* opinion distinguished between independent expenditures—regulated by then FECA § 608(e)(1)—and coordinated expenditures. The *Buckley* opinion unequivocally stated that controlled or coordinated expenditures are treated as "contributions rather than expenditures" under the FECA.[5] 424 U.S. at 46-47 & n. 53, 96 S.Ct. at 648 & n. 53. Although *Buckley* found the ceiling on independent expenditures failed to serve substantial enough

[5] Coordinated expenditures are treated as campaign contributions that must be reported pursuant to § 441a(a)(7)(B)(i).

government interests to be constitutional, it reached the opposite conclusion as to the limitations on expenditures by national or state political parties. *Id.* at 55-59 & n. 67, 96 S.Ct. at 652-54 & n. 67 ("Does 18 U.S.C. § 608(f) (1970 ed., Supp. IV) violate [constitutional] rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office? Answer: NO, as to the Fifth Amendment challenge advanced by appellants."). *Buckley* accepted the FECA's treatment of expenditures by national and state committees of political parties as contributions, as have subsequent opinions of the Supreme Court. *See DSCC*, 454 U.S. 27, 29 n. 1, 102 S.Ct. 38, 41 n. 1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such "independent' expenditures by the national and state party committees."). Similarly, *MCFL* made the same distinction when interpreting the meaning of independent expenditure limits in § 441b. *MCFL*, 479 U.S. at 259-60, 107 S.Ct. at 628-29.

Subsequent amendments to the FECA include "expressly advocating" into the definition of independent expenditures. *See* 2 U.S.C. § 431(17). Coordinated expenditures of political parties, however, are not defined in this manner. *See id.* § 431(9)(B)(ix); *cf. id.* § 431(8)(B)(v), (x), (xii) (what is not a contribution). This is some evidence of congressional intent that the phrases are not intended to have the same meaning.

The distinction between independent expenditures and political party expenditures that are deemed to be contributions, and their different treatment by the Supreme Court, negates the necessity that "expenditures in connection with" be construed identically in different sections of the FECA. However, the meaning of "expenditures in connection with" is not perfectly clear, else the Court in *MCFL* would not have had to cabin its meaning under

§ 441b in the manner it did. The question then becomes whether we must construe the phrase as narrowly as the Supreme Court did in *MCFL* in order to uphold its validity.

C

The FEC has issued advisory opinions interpreting the "expenditures in connection with" phrase in § 441a(d(3) in a manner different than that adopted by the district court and urged upon us by the Committee. We believe this is an appropriate circumstance in which to follow the Supreme Court's admonishment that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (footnote omitted); *see also DSCC*, 454 U.S. at 37, 102 S.Ct. at 44-45 (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded").[6]

FEC Advisory Opinion 1984-15 addressed questions raised by the Republican Party regarding spending for a series of television ads denigrating the potential Democratic presidential candidates, relating to an upcoming election. The FEC responded to a specific question whether such spending was within the limitations of § 441a(d).

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with

[6] We note that one of the reasons the *Buckley* opinion gave for its "express advocacy" restrictive interpretation of § 608(e)(1)'s "relative to" language was that most who were subject to the statute's criminal sanctions had no right to obtain an advisory opinion of the FEC. *See* 424 U.S. at 40 n. 47, 96 S.Ct. at 645 n. 47. It noted that only candidates, federal office holders and *political committees* had that right. *Id.* Section 441a(d), at issue before us, applies only to political committees; thus all to whom it applies can secure advisory opinions from the FEC.

> that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (May 31, 1984) (footnote omitted). The opinion then concluded that the spending in question was a coordinated expenditure subject to the limitations in § 441a (d)(2).

Advisory Opinion 1985-14 responded to questions from a Democratic Congressional Committee regarding proposed publicly focusing on a number of congressmen, not all with announced opposition candidates. A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (May 30, 1985). The opinion endorsed Advisory Opinion 1984-15 with its construction of § 441a(d) as regulating expenditures that "both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message." [7]

The FEC has "primary and substantial responsibility for administering and enforcing" the FECA. *Buckley*, 424 U.S. at 109, 96 S.Ct. at 677-78. The FEC argues that its construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electionering message as a reasonable one to which we must defer. Viewing the party expenditures as contributions, as we must, we agree.

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[7] Advisory Opinion 1978-46 appears more restrictive; it can be read to adopt the express advocacy position. A.O. 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978). But even if the more recent decisions represent a change in position by the FEC we must still give the current view deference if the current construction is reasonable. *Rust v. Sullivan*, 500 U.S. 173, 186-87, 111 S.Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991).

"[T]he primary interest served by the Act is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC* 454 U.S. at 41, 102 S.Ct. at 47. The Supreme Court cases have distinguished between the potential for corruption that attaches to contributions and coordinated expenditures, and those that might develop from independent expenditures, finding less inherent risk in the latter. Our analysis, therefore, with respect to controls on coordinated expenditures and contributions under § 441a is different than that required for § 441b.

Section § 441a(d) addresses the concern that large contributors to political parties will exert undue influence on a candidate if elected to office. The monetary ceiling on coordinated expenditures by political organizations diminishes the potential of such undue influence but preserves the important role of political parties. *See DSCC*, 454 U.S. at 41, 102 S.Ct. at 46-47. In contrast, the purpose behind § 441b is to prevent corporate and labor expenditures from effectively acting as "political war chests" on behalf of candidates, because these organizations could use funds "amassed in the economic marketplace . . . [for] unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257, 107 S.Ct. at 627. The FECA thus provides different regulations tailored to different perceived evils.[8] Independent expenditures are theoretically unlimited but such expenditures in excess of low limits must be reported, along with identification of those who contributed more than $200. Contribution limits still apply. Giving deference to the FEC's interpretation, we hold that § 441a(d)(8) applies to coordinated spending that involves a clearly identified candidate and

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[8] We have already discussed how subsequent FECA amendments have adopted the "express advocacy" criteria to differentiate between independent and coordinated expenditures.

an electioneering message, without regard to whether that message constitutes express advocacy.

D

The Committee does not seriously contest that the anti-Wirth publicity was directed at a clearly identified candidate. "Wirth Facts #1" referenced Wirth's senatorial aspirations and challenged his personal integrity and campaign statements in the context of the current election.[9] Wirth was not yet the Democratic nominee, but the FECA regulates coordinated expenditures made before the primary election. A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766. The Committee's objective to elect the eventual Republican candidate is not diminished because a Democratic nomine has not emerged. *See Buckley*, 424 U.S. at 79, 96 S.Ct. at 633 (major purpose of expenditures by candidates and political committees "is the nomination or election of a candidate").

We next consider whether "Wirth Facts #1" contained an electioneering message.[10] Advisory Opinion 1984-15 examined proposed television advertising by the Republican National Committee that would "question or challenge the candidate's statements, position, or record." The FEC concluded that the

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[9] *See also* 2 U.S.C. § 431(18) which reads:

The term "clearly identified" means that—

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

[10] We agree with the district court that the message in "Wirth Facts #1" would not constitute express advocacy within the narrow definition of *Buckley* and *MCFL*. It lacks the express words "vote for" or "vote against," or words of similar import, although it comes close when the ad suggests that an identified candidate distorted his voting record.

> clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republic Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. . . . These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (citation and footnotes omitted). The next year, the FEC relied upon that construction in rendering Advisory Opinion 1985-14 to the Democratic Congressional Campaign Committee stating that "[e]lectioneering messages include statements 'designed to urge the public to elect a certain candidate or party.'" A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587, 77 S.Ct. 529, 539, 1 L.Ed.2d 563 (1957)).

Any reasonable reading of "Wirth Facts #1," which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to "diminish" public support for Wirth and "garner support" for the unnamed Republican nominee. "Wirth Facts #1" unquestionably contained an electioneering message. We conclude that that the anti-Wirth publicity was an "expenditure in connection with" the 1986 Colorado senatorial election be-

cause it named both a clearly identifiable candidate and contained an electioneering message. The Committee, therefore, violated the FECA by making a § 441a(d)(3) expenditure after delegating to the National Republican Senatorial Committee the authority to spend all of the Committee's available funding for the 1986 Colorado Senate race.

II

We next consider the Committee's constitutional challenges to the FECA. The Committee asserts that the monetary caps in § 441a(d)(3) violate its First Amendment guarantees of freedom of speech and association. The Committee focuses on the alleged absence of a compelling governmental interest served by the restrictions in § 441a(d)(3) and also asserts that the statute discriminates based upon content. The FEC's position is that *Buckley* and later cases endorse distinctions between independent expenditures and contributions, and that other FECA contribution ceilings have consistently been upheld as constitutional by the Supreme Court. We agree with the FEC that § 441a(d)(3) is a permissible burden on speech and association.

The primary purpose of the contribution and expenditure caps in the FECA are to prevent corruption or the appearance of corruption. *Buckley* 424 U.S. at 25-26, 96 S.Ct. at 637-38. The FECA starts from the premise that political committees may make only minimal expenditures in connection with campaigns, § 441a(a) (dollar limits on contributions), then creates one exception at § 441a(d)(3) (coordinated expenditure limits for certain political committees made in connection with federal election campaigns). *DSCC*, 454 U.S. at 28-29 n. 1, 102 S.Ct. at 40-41 n. 1; 11 C.F.R. § 110.7(b); *see also* 2 U.S.C. § 431(14)-(16). This exception allows for greater monetary support by political parties than would otherwise be permitted by § 441a(a). The coordinated expenditures permitted by § 441a(d)(3) are treated for purposes of

reporting and monetary limitations as contributions from the political committee to the candidate, § 441a(a)(7)(B)(i); *see also* § 434(b)(4)(H)(iv), and fall within the contribution ceilings contained in § 441a(a). *See Buckley*, 424 U.S. at 46, 96 S.Ct. at 647-48; *FEC v. National Political Action Committee*, 470 U.S. 480, 492, 105 S.Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) (*NCPAC*).

The same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees.[11] The opportunity for abuse is greater when the contributions (or in the instant case, coordinated expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures. *See Buckley*, 424 U.S. at 26-27, 96 S.Ct. at 638-39; *NCPAC*, 470 U.S. at 497, 105 S.Ct. at 1468-69. The Committee, stressing the benefits of party discipline and the broad interests of party success, argues that the dangers of domination of candidates by large individual donors do not apply to party expenditures. But party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures. The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expendi-

[11] We acknowledge that *Buckley* upheld then 18 U.S.C. § 608(f) as constitutional when challenged as discriminatory under the Fifth Amendment, and not the First Amendment, which is the basis for the Committee's constitutional challenge here. *Buckley*, 424 U.S. at 59 n. 67, 96 S.Ct. at 654 n. 67. However, *MCFL* adopted much of the reasoning in *Buckley* in analyzing the First Amendment challenges to 441b. We do not, therefore, discount the importance of *Buckley* in the context of our First Amendment analysis.

tures by political parties. This case is, therefore, ideally postured for deference to the congressional will.

The Supreme Court has endorsed the government's interest in curtailing large campaign contributions as legitimate. In addition to preventing corruption or the appearance of corruption, these restrictions "equalize the relative ability of all citizens to affect the outcome of elections," *Buckley*, 424 U.S. at 26, 96 S.Ct. at 638, and to a degree cap campaign costs and increase accessibility to our political system. *Id.* The Court has distinguished between restrictions on contributions and restrictions on independent expenditures and then invalidated spending restrictions while upholding contribution limits. *Id.* at 58-59, 96 S.Ct. at 653-54.

By treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, "secur[ing] a political *quid pro quo* from current and potential office holders." *Id.* at 26-27, 96 S.Ct. at 638. Contribution limits regulate the quantity of political speech, but do not foreclose speech or political association. We do not see this monetary cap as content based; it is rather a consequence of the funding source. We uphold as constitutional, against the Committee's First Amendment challenge, the spending limits in § 441a(d)(3).

We REVERSE and REMAND with instructions that the district court enter judgment in favor of the FEC, and for a determination under 2 U.S.C. § 437g(a)(6) of the appropriate civil penalty.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433, 93-1434
(D.C. No. 89-N-1159)

[Caption Omitted in Printing]

ORDER

Entered September 6, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LOGAN Circuit Judges and REED*, District Judge.

This matter comes on for consideration of appellants/cross-appellees Colorado Republican Federal Campaign Committee and Douglas Jones' suggestion for rehearing in banc.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. The court having been polled

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* The Honorable Edward C. Reed, Jr., Senior United States Judge, United States District Court for the District of Nevada, sitting by designation.

on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Judges Baldock, Ebel and Kelly voted to grant rehearing. Judge Lucero is recused.

Entered for the Court

PATRICK FISHER
Clerk

_____

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

_____

Civil Action No. ———

FEDERAL ELECTION COMMISSION,
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200,

Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

and

DOUGLAS L. JONES, AS TREASURER,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

Defendants.

_____

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

JURISDICTION

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted the Federal Election Commission ("Commission" or "FEC") by provisions of the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), codified at 2 U.S.C. §§ 437d(a)(6) and 437g(a)(6)(A). This court has original jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency

of the United States expressly authorized to sue by an act of Congress.

VENUE

2. Venue is properly found in the District of Colorado, in accord with 2 U.S.C. § 437g(a)(6)(A), as the defendants can be found, reside or transact business in this district.

THE PARTIES

3. Plaintiff Federal Election Commission is the agency of the United States government empowered with exclusive and primary jurisdiction with respect to the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The FEC is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437g (a)(6).

4. Defendant Colorado Republican Federal Campaign Committee ("State Party") is a political committee within the meaning of 2 U.S.C. § 431(4) and is the federal account of the Colorado Republican State Central Committee. *See* 11 C.F.R. § 102.5(b)(1)(i). Hence the State Party is a party committee which represents a political party on the state level. *See* 11 C.F.R. § 100.5(e)(4).

5. Defendant Douglas L. Jones is the treasurer of the Colorado Republican Federal Campaign Committee. *See* 2 U.S.C. §§ 432(a), 432(c), and 434(a)(1).

STATUTES

6. 2 U.S.C. § 441a(d)(3)(A) states, *inter alia*, that a State committee of a political party may not make any

expenditure in connection with the general election campaign of a candidate for the United States Senate in that State who is affiliated with such party which exceeds the greater of 2 cents multiplied by the voting age population of the State or $20,000.

7. 2 U.S.C. § 434(b)(4)(H)(iv) states that political committees must report to the Commission, for the reporting period and the calendar year, the total amount of expenditures made under 2 U.S.C. § 441a(d).

8. 2 U.S.C. § 434(b)(6)(B)(iv) states that political committees (other than the authorized committees of candidates) must report to the Commission the name and address of each person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of any such expenditure as well as the name of, and the office sought by, the candidate on whose behalf the expenditure is made.

9. 2 U.S.C. § 441a(f) states, *inter alia*, that no political committee shall knowingly make any expenditure in violation of 2 U.S.C. § 441a, and no officer or employee of a political committee shall knowingly make any expenditure on behalf of a candidate in violation of any limitation imposed on contributions and expenditures under 2 U.S.C. § 441a.

ADMINISTRATIVE PROCEEDINGS

10. On June 12, 1986, M. Buie Seawell filed an administrative complaint on behalf of the Colorado State Democratic Party against the State Party and its treasurer. On June 19, 1986, the Commission notified the State party and its treasurer that a complaint had been filed against them. Acting upon the basis of information ascertained from the complaint and the response made thereto, the Commission, by the affirmative vote of at least four of its members, found reason to believe on November 5,

1986, that the State Party and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). The basis of this finding was that it appeared that the State Party and its treasurer had made a disbursement for a radio advertisement that appeared to be an expenditure in connection with the general election for United States Senator from Colorado in 1986, and thus said expenditure appeared to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A); the State Party and its treasurer, however, had not reported these expenditures in accordance with 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). An investigation was initiated.

11. By letter dated November 13, 1986, the State Party and its treasurer were notified of the Commission's reason to believe findings of November 5, 1986.

12. The Commission's General Counsel notified the State Party and its treasurer by letter dated November 10, 1987, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that they had violated the Act, and provided them with a brief stating the position of the General Counsel on the legal and factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). The State Party and its treasurer were provided an opportunity to respond.

13. On June 14, 1988, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that the State Party and its Treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

14. By letter dated June 23, 1988, the State Party and its treasurer were notified of the Commission's probable cause to believe findings of June 14, 1988, and a proposed conciliation agreement directed to the State Party and its treasurer was enclosed.

15. The Commission's General Counsel notified Douglas L. Jones by letter dated September 28, 1988, that the

General Counsel was prepared to recommend that the Commission find probable cause to believe that Douglas L. Jones, as treasurer of the State Party, had violated the Act, and provided him with a brief stating the position of the General Counsel in the legal and factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). Douglas L. Jones, as treasurer, was provided an opportunity to respond.

16. On January 10, 1989, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that Douglas L. Jones, as treasurer of the State Party, violated 2 U.S.C. §§434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

17. By letter dated January 17, 1989, the State Party and Douglas L. Jones, as treasurer, were notified of the Commission's probable cause to believe findings of January 10, 1989, and a proposed conciliation agreement directed to the State Party and Douglas L. Jones, as treasurer, was enclosed.

18. The Commission endeavored for a period of not less than thirty (30) days to correct the violation by informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with the defendants in accordance with 2 U.S.C. § 437g(a)(4)(A).

19. On April 7, 1989, after failing to reach an agreement with the State Party and Douglas L. Jones, as treasurer, the Commission, by the affirmative vote of at least four of its members, authorized, pursuant to 2 U.S.C. § 437g(a)(6)(A), the filing of a civil suit against the defendants in the United States District Court.

20. Thereafter, the defendants were notified by letter dated April 10, 1989, of the Commission's authorization of the instant civil action.

21. The Commission has met all of the jurisdictional prerequisites for filing this suit.

STATEMENT OF CLAIM

COUNT 1

22. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 21, inclusive.

23. Defendants were prohibited by 2 U.S.C. § 441a (d)(3)(A), from making expenditures in connection with the 1986 general election campaign of a candidate for United States Senator from Colorado in excess of an amount equal to 2 cents multiplied by the voting age population of the State, which amount was $103,248.

24. Defendants assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee.

25. On April 2, 1986, defendants made an expenditure of $15,000 to pay for a radio advertisement, known as "Wirth Facts #1." The text of this advertisement was as follows:

> "Paid for by the Colorado Republican State Central Committee.
>
> "Here in Colorado we're use [sic] to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> "Tim Wirth has a right to run for Senate, but he doesn't have a right to change the facts."

26. "Wirth Facts #1" was aired during the period between April 2, 1986 and August 12, 1986. During that

period, Tim Wirth was a Member of the United States House of Representatives and a Democratic candidate for the United States Senate. He had no opposition for the Democratic party nomination for the United States Senate in the primary held August 12, 1986. In that primary, he was nominated by the Democratic party for the office of United States Senator, and ran in the general election as the opponent of the Republican party candidate for United States Senator.

27. Defendants' expenditure of $15,000 to pay for the radio advertisement known as "Wirth Facts #1" was made in connection with the 1986 general election for the United States Senate in Colorado.

28. Defendants' expenditure of $15,000 to pay for "Wirth Facts #1" was an expenditure made by the State committee of a political party that was subject to 2 U.S.C. § 441a(d).

29. Defendants did not report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) as required by 2 U.S.C. § 434(b)(4)(H)(iv).

30. Defendants' failure to report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a (d) violated 2 U.S.C. § 434(b)(4)(H)(iv).

COUNT 2

31. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

32. Defendants were required by 2 U.S.C. § 434(b) (6)(B)(iv) to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure,

as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

33. Defendants did not report to the Commission, with respect to their expenditure for "Wirth Facts #1," the name and address of each person who received said expenditure from the State Party, the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

34. Defendants' failure to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made, violated 2 U.S.C. § 434(b)(6)(B)(iv).

COUNT 3

35. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

36. Defendants' expenditure of $15,000 in connection with the 1986 general election for U.S. Senator from Colorado pursuant to 2 U.S.C. § 441a(d) was in excess of the limitation on the amount of such contributions set forth at 2 U.S.C. § 441a(d)(3)(A)(i), in that defendants had assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee, and therefore defendants could no longer make such expenditures.

37. Defendants violated 2 U.S.C. § 441a(f) by making an expenditure in excess of the limitation set forth at 2 U.S.C. § 441a(d)(3)(A)(i).

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission prays that this Court:

(1) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 434(b)(4)(H)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(2) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(3) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 441a(f) by making an expenditure in connection with a general election campaign for federal office in excess of a limitation set forth at 2 U.S.C. § 441a.

(4) Assess against defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, a civil penalty of the greater of five thousand dollars ($5000) or an amount equal to 100 percent of the amounts involved in each of the violations committed, pursuant to 2 U.S.C. § 437g(a)(6)(B), for which defendants shall be jointly and severally liable;

(5) Permanently enjoin each defendant from similar future violations of the Federal Election Campaign Act of 1971, as amended; and

(6) Award the plaintiff Federal Election Commission such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Ivan Rivera
IVAN RIVERA
Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
Attorney

For the Plaintiff
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

July 5, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

DEFENDANTS' ANSWER AND COUNTERCLAIMS

NOW COMES the Defendants in the above-captioned action, Colorado Republican Federal Campaign Committee ("the State Party") and Douglas L. Jones, as treasurer, and hereby answer the complaint of the Federal Election Commission ("FEC") a follows:

JURISDICTION

1. Paragraph 1 contains allegations of law as to which no responsive pleading is required.

VENUE

2. Venue is not contested.

PARTIES

3. Defendants admit the allegations in paragraph 3 of the complaint.

4. Defendants admit the allegations in paragraph 4 of the complaint.

5. Defendants admit the allegations in paragraph 5 of the complaint.

STATUTES

6. Paragraph 6 contains allegations of law as to which no responsive pleading is required.

7. Paragraph 7 contains allegations of law as to which no responsive pleading is required.

8. Paragraph 8 contains allegations of law as to which no responsive pleading is required.

9. Paragraph 9 contains allegations of law as to which no responsive pleading is required.

ADMINISTRATIVE PROCEEDINGS

10. With respect to the allegations in paragraph 10, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo, that an administrative complaint had been filed against it (see Exhibit 1 attached). In addition, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo, that it had determined there was reason to believe that they violated 2 U.S.C. § 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) with respect to a radio advertisement discussing defense issues. The FEC also notified the State Party and its treasurer that it had "failed to pass a motion to find reason to believe" that the State Party and its treasurer, Vincent Zarlengo, had violated 2 U.S.C. § 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with other advertisements noted in the complaint. The State Party denies that it had not reported the expenditures for these radio advertisements. Defendants admit that an investigation was initiated. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 10, and therefore deny the same.

11. With respect to the allegations in paragraph 11, Defendants admit that by letter dated November 13, 1986, the State Party and its treasurer, Vincent Zarlengo, were notified of the Commission's reason to believe findings of November 5, 1986. (See Exhibit 2 attached).

12. With respect to the allegations in paragraph 12, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo that the General Counsel was prepared to recommend that the Commission find probable cause to believe that a violation has occurred, and further admit that they were provided an opportunity to respond.

13. Wtih respect to the allegations in paragraph 13, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore deny the same.

14. With respect to the allegations in paragraph 14, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo that it had found probable cause to believe that they violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), and further admit that a proposed conciliation agreement was enclosed.

15. With respect to the allegations in paragraph 15, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo that the General Counsel intended to recommend probable cause to believe that Douglas L. Jones, as new treasurer of the State Party, had violated the Act, and further admit that Douglas L. Jones, as treasurer, was provided an opportunity to respond.

16. With respect to the allegations in paragraph 16, Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations, and therefore deny the same.

17. With respect to the allegations in paragraph 17, Defendants admit that the FEC notified the State Party and its new treasurer, Douglas L. Jones, that it had found probable cause to believe Douglas L. Jones violated the Act, and further admit that a proposed conciliation agreement was enclosed.

18. With respect to the allegations in paragraph 18, Defendants admit that the FEC endeavored to enter into a conciliation agreement in accordance with 2 U.S.C. § 437g(a)(6)(A).

19. With respect to the allegations in paragraph 19, Defendants admit that the FEC did not reach an agreement with the State Party and its new treasurer, Douglas

L. Jones. However, Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 18, and therefore deny the same.

20. With regard to the allegations in paragraph 20, Defendants admit that the FEC notified the State Party by letter dated April 10, 1989 that the Commission authorized the General Counsel to institute a civil action for relief in the United States District Court.

21. Paragraph 21 contains allegations of law as to which no responsive pleading is required.

STATEMENT OF CLAIM

COUNT 1

22. Paragraph 22 contains no allegations as to which a responsive pleading is required.

23. With respect to the allegations in paragraph 23, Defendants admit that the 2 U.S.C. § 441a(d)(3)(A) limitation for the Office of Senate in the State of Colorado was $103,248 in connection with the general election campaign of the candidate for the office of Senate affiliated with the party.

24. With respect to the allegations in paragraph 24, Defendants admit that the Colorado Republican Party authorized the National Republican Senatorial Committee to serve as its agent for the purpose of making expenditures allowed under 2 U.S.C. § 441a(d)(3) in connection with the general election campaign of its candidate for United States Senate.

25. With respect to the allegations in paragraph 25, Defendants admit that the State Party made an expenditure of $15,000 to pay for a radio advertisement, known as "Wirth Facts #1" and further admits that the text of the advertisement was as alleged.

26. With respect to the allegations in paragraph 26, Defendant's deny that "Wirth Facts #1" was aired during the period between April 2, 1986 and August 12, 1986. "Wirth Facts #1" was aired between April 4, 1986 and April 13, 1986. Defendants admit that Tim Wirth was a Member of the United States House of Representatives. Defendants deny that at the time of the advertisement that Tim Wirth was an official candidate of the Democratic Party for the Office of United States Senate under the laws of Colorado. Defendants deny that Tim Wirth had no opposition for the Democratic Party nomination for the United States Senate and aver that he was opposed by David Grace. Defendants admit that the Democratic primary was held on August 12, 1986. Defendants admit that Tim Wirth was nominated by the Democratic Party in its August 12, 1986 primary for the office of United States Senator and that he ran for United States Senator in the general election and was opposed by a candidate nominated by the Republican Party on August 12, 1986.

27. With respect to the allegations in paragraph 27, Defendants deny that the State Party's expenditure of $15,000 to pay for the radio advertisement known as "Wirth Facts #1" was made in connection with the 1986 general election for the United States Senate in Colorado. The State Party's expenditure was an operating expenditure of the State Party and reported as such.

28. With respect to the allegations in paragraph 26, Defendants deny that the State Party's expenditure of $15,000 to pay for "Wirth Facts #1" was an expenditure made by the State committee of a political party that was subject to 2 U.S.C. § 441a(d).

29. With respect to the allegations in paragraph 29, Defendants deny that the State Party did not report the expenditure of $15,000 paid for Wirth Facts #1 to the Commission and further denies that it made an expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) which

was reportable pursuant to 2 U.S.C. § 434(b)(4)(H)(iv).

30. With respect to the allegations in paragraph 30, Defendants deny that they violated 2 U.S.C. § 434(b)(4)(H)(iv).

COUNT 2

31. Paragraph 31 contains no allegations as to which a responsive pleading is required.

32. Paragraph 32 contains allegations of law as to which no responsive pleading is required.

33. With respect to the allegations in paragraph 33, Defendants deny that the State Party did not report to the Commission, with respect to its expenditure for "Wirth Facts #1," the name and address of each person who received said expenditure from the State Party, the date, amount, and purpose of such expenditure. Defendants further deny that the State Party was required to identify the name of, and office sought of any candidate. Defendants deny all further allegations of Paragraph 33.

34. With respect to the allegations in paragraph 34, Defendants deny that they violated 2 U.S.C. § 434(b)(6)(B)(iv).

COUNT 3

35. Paragraph 35 contains no allegation as to which a responsive pleading is required.

36. With respect to the allegations in paragraph 36, Defendant's deny that its expenditure of $15,000 for "Wirth Facts #1" was made in connection with the 1986 general election for U.S. Senator from Colorado. Defendants admit that the Colorado Republican Party authorized the National Republican Senatorial Committee to serve as its agents for the purpose of making expenditures under 2 U.S.C. § 441a(d)(3) but deny all further allegations of paragraph 36.

37. With respect to the allegations in paragraph 37, Defendants deny that they violated 2 U.S.C. § 441a(f).

PRAYER FOR RELIEF

No answer is required.

ADDITIONAL DEFENSES

38. The complaint fails to state a claim upon which relief can be granted, and the State Party, and Douglas L. Jones, as treasurer are entitled to judgment in their favor as a matter of law.

39. The State Party has not violated 2 U.S.C. § 441a(f) because its disbursements for "Wirth Facts #1" are not subject to 2 U.S.C. § 441a(d) limits.

40. The State Party's disbursements are not subject to the limits of 2 U.S.C. § 441a(d) because its disbursements for "Wirth Facts #1" was not made "in connection with" a "general election."

41. The State Party's disbursements are not subject to the limits of 2 U.S.C. § 441a(d) because the disbursement did not benefit any candidate for general election.

42. The State Party fully reported the expenditures for "Wirth Facts #1" as required by the Federal Election Campaign Act of 1971, as amended.

43. The State Party has not violated 2 U.S.C. § 434(b)(4)(H)(iv) with respect to this expenditure because it has not made an expenditure pursuant to 2 U.S.C. § 441a(d).

44. The State Party has not violated 2 U.S.C. § 434(b)(6)(B)(iv) because it has not made an expenditure pursuant to 2 U.S.C. § 441a(d).

45. 2 U.S.C. § 441a(d) is unconstitutional on its face as a vague and overbroad infringement on the freedom of speech and association guaranteed to the State Party by the First Amendment to the United States Constitution.

46. If 2 U.S.C. § 441a(d) is construed to prohibit the State Party's expenditure for an advertisement criticizing an incumbent congressman, then that section is unconstitutional as applied because it violates the freedom of speech and association guaranteed to the State Party by the First Amendment to the United States Constitution.

COMPULSORY COUNTERCLAIM

47. The State Party seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that the limits on its expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U.S.C. § 441a(d) are unconstitutional, both facially and as applied, and appropriate further relief pursuant to 28 U.S.C. § 2202 and other applicable statutes. This court has original jurisdiction of this counterclaim pursuant to 28 U.S.C. § 1331 and its pendent and ancillary jurisdiction.

48. The State Party could and would have made expenditures directly in connection with the general election campaign for the Office of United States Senator from the State of Colorado that exceeded the limits established by 2 U.S.C. § 441a(d), but for the deterrent and chilling effect of the statutory prohibition on such expenditures. Moreover, the State Party could and would make such expenditures in connection with future general campaigns but for the deterrent and chilling effect of those limits.

49. The radio advertisement known as "Wirth Facts #1" was one of several such advertisements concerning Tim Wirth that were purchased and aired by the State Party at approximately the same time. The FEC found a violation with respect to "Wirth Facts #1," and not the other such advertisements, solely because of the content of "Wirth Facts #1."

50. The spending limits established by 2 U.S.C. § 441a(d) restrict political speech by political bodies such as the State Party concerning political subjects on the

basis of content in violation of the freedoms of speech and association guaranteed by the First Amendment to the United States Constitution.

51. The spending limits established by 2 U.S.C. § 441a(d) discriminate against the State Party because of the State Party's political activities in violation of the freedoms of speech and association guaranteed by the First Amendment to the United States Constitution.

52. The restrictions and requirements of 2 U.S.C. § 441a(d) are unconstitutionally vague and overbroad and chill and deter speech in violation of the freedoms of speech and association guaranteed by the First Amendment to the United States Constitution.

53. The FEC denies that 2 U.S.C. § 441a(d) violates the United States Constitution as alleged above, has initiated enforcement proceedings against the State Party for an alleged violation of 2 U.S.C. § 441a(d), and will continue to enforce 2 U.S.C. § 441a(d) unless appropriate relief is granted in this proceeding.

WHEREFORE, the State Party and Douglas L. Jones, as Treasurer, pray that the court declare 2 U.S.C. § 441a (d) unconstitutional, facially and as applied; that it dismiss this action with prejudice; that it award the State Party its reasonable costs and attorneys fees; and that it award the State Party such other and further relief as the court deems just and proper.

Respectfully submitted,

/s/ Jan W. Baran
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Carol A. Laham
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(202) 429-7000
Attorneys for the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as Treasurer

August 21, 1989

EXHIBIT 1

[FEC Logo]

FEDERAL ELECTION COMMISSION
Washington, D.C. 10463

June 19, 1986

Colorado Republican State Central Committee
1275 Tremont Place
Denver, Colorado 80204

Re: MUR 2186

Dear Sir:

This letter is to notify you that the Federal Election Commission received a complaint which alleges that the Colorado Republican State Central Committee may have violated certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 2186. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against the Colorado Republican State Central Committee in this matter. Your response must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)

(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-8200. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

CHARLES N. STEELE
General Counsel

By: /s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Deputy General Counsel

Enclosures
Complaint
Procedures
Designation of Counsel Statement

COMPLAINT

BEFORE THE

FEDERAL ELECTION COMMISSION

I. INTRODUCTION

The Colorado State Democratic Party files this Complaint in order to initiate an immediate investigation of illegal spending practices by the Colorado Republican State Central Committee (the "Republican Committee"). The public record shows, and an investigation will confirm, that the Republican Committee has disregarded the legal expenditure limitations under the Federal Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. Sec. 431 *et seq.*, in its ongoing effort to secure the defeat of the likely Democratic Senate nominee, Congressman Tim Wirth, in the upcoming United States general election.

Through both direct mail and broadcast media, over a period of weeks and at considerable cost, the Republican Committee has launched wave after wave of general public criticism designed to influence voters to cast their ballots against Congressman Wirth. The Republican Committee apparently does not intend, however, to do as the law requires: account for the money so spent under appropriate FECA limitations, particularly 2 U.S.C. Sec. 441a(d)(3), applicable to general election spending.

The election is near in time, and as the weeks draw closer to election day, there is every sign that these illegal Republican Committee expenditures will continue. The State Party urges the Commission to act with all appropriate speed. The spending imbalance in the Colorado United States Senate campaign caused by these illegal expenditures is significant and only prompt agency attention to this matter can help restore some semblance of fairness and respect for law to Republican Senate campaign spending in Colorado this year.

II. THE FACTS

The United States Senate race in Colorado revolves around the Senate seat now held by retiring incumbent Senator Gary Hart. With no incumbent seeking re-election, this "open seat" for which candidates are competing is being vigorously contested. On June 7, 1986, the Republican Party nominated, from a field of 3, one candidate whose name will appear on the August 12 primary ballot. On the same day, the Democratic Party also nominated a single candidate.

The Republican Party—both the national party and the state party—view Colorado as an excellent opportunity to turn a formerly Democratic seat into a Republican one. As shown in the newspaper clippings contained in Attachment A, the Republicans have targeted the Colorado race as part of their attempt to maintain a Republican majority in the Senate. Vice President Bush even described the race as the "most important" for the Republicans. Attachment B. Such targeting has in the past translated into extraordinary expenditures of funds by the Republican Party under 2 U.S.C. Sec. 441a(d)(3) in support of the Republican candidate and in opposition to the Democratic nominee.

These expenditures have already begun in Colorado. The Republican Comimttee has to date published at least two brochures and run three radio spots attacking Congressman Tim Wirth, who is the only candidate seeking the nomination of the Democratic Party for the United States Senate. The first spot and brochure citicize Congressman Wirth's voting record on defense ("Defense Ad"). The second and third spots and second brochure are concerned with Congressman Wirth's position on the AT & T divestiture ("Telephone Ad").[1] Copies of the brochures and the text of the radio spots are appended to

[1] For convenience, throughout this complaint, both the brochures and radio spots will be referred to collectively as "The Ads".

this complaint as Attachment C (Defense Ad) and Attachment D (Telephone Ad).

The Ads have been widely disseminated around Colorado. The Defense Ad, by the Republican Committee's own estimate, was mailed to over 100,000 Colorado voters at a cost of more than $15,000; the cost of the defense radio ad was reported to be $15,000 as well. The two ads together represent, therefore, a total of $30,000 in expenditures by the Republican Committee. Attachment E. The Telephone Ad in brochure form has been distributed to a similar number of voters and its media counterpart aired on 30 statewide radio stations at a total cost of approximately $30,000. Attachment F.

These are only the most publicized of the Republican Committee's activities against Congressman Wirth. Other mailings by the Republican Committee have been cited in the press reports. *See, e.g.*, Attachment G. Assuming these other mailings were distributed in a manner familiar to The Ads, the cost would be at a minimum an additional $15,000.

In any event, the Republican Committee, by its own admission, has spent in excess of $60,000 to attack Congressman Wirth. To date (through the April 15 Quarterly Report), reports filed with the Federal Election Commission ("FEC") by the Republican Committee show no disclosures of coordinated expenditures (2 U.S.C. Sec. 441a(d)) to reflect the benefit derived from The Ads by the Republican nominee. As will be shown in the discussion below, failure by the Republican Committee to account under lawful limits for these coordinated expenditures—and to report them—would constitute clear violations of the FECA which, if uncorrected, will result in the Republican nominee receiving funding far in excess of the legal allowance.

III. THE LAW

Section 441a(d)(3) of the Federal Election Campaign Act operates as a limitation on the expenditures made by

political party committees in connection with the general election campaigns of their nominees for the United States Senate. Among the political party committees entitled to these special spending privileges are the "state committees" of each political party. In the State of Colorado, for purposes of this Complaint and on all other relevant occasions, the "state committee" of the Republican Party in the State of Colorado is the Republican State Central Committee named as Respondent in this action.

The spending rights of political parties like the Republican Committee are well defined under the law. The Republican Committee may make direct or indirect contributions to candidates, in amounts not exceeding $5,000 per election. 2 U.S.C. Sec. 441a(a)(2). It may make coordinated Sec. 441a(d) expenditures on its nominee's behalf. Also, the Republican Committee could somewhat supplement the total dollars expended in connection with the Senate general election campaign, by making certain "exempt" expenditures in support of the general election nominee in accordance with the terms and conditions of the volunteer campaign materials, slate card and other relevant exemptions. See, e,g., 2 U.S.C. Sec. 431(8)(B)(v), (x) & (xii); 2 U.S.C. Sec. 431(9)(B)(iv), (viii) and (ix).

These are the only choices available to the Republican Committee in expending funds specifically to promote the election of its nominee or the defeat of the Democratic nominee for the United States Senate. It is significant that regulations of the Federal Election Commission specifically prohibit political parties from undertaking "independent" expenditures in support of their candidates in the general election. 11 C.F.R. Sec. 110.7(a)(5) & (b)(4). *See also* A.O. 1984-15 and A.O. 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) Para. 5766, 5561. This prohibition serves to impose Sec. 441a(a) or Sec. 441a(d) limitations on any spending which might otherwise

appear "independent" in nature but which cannot be so treated because the spending entity is a state party.

IV. DISCUSSION

The Republican Committee is apparently attempting to steer clear of lawful limitations on any of its aggressive anti-Wirth spending.[2] The Committee appears to assume a right to make independent expenditures, or at least quasi-independent expenditures, in opposition to the Wirth candidacy. The advertisements financed by the Committee through direct mail or broadcast media specifically identify Congressman Wirth and the texts of these advertisements, in fact, are organized entirely around derogatory claims about his record. Those same advertisements make it clear that their purpose is to influence voter perceptions about Congressman Wirth's Senate candidacy. Public statements by Republican Committee officials about this anti-Wirth campaign confirm that it has this purpose and only this purpose. It is equally obvious from the text of these advertisements that the perception that their authors hope to generate among Colorado voters would not be favorable to Congressman Wirth.

The Commission has already addressed and resolved this issue in Advisory Opinions 1984-15 and 1985-14. 1 Fed. Elec. Camp. Fin. Guide (CCH) Para. 5819, 5766. Both these opinions address the issue of spending by party committees in opposition to the other party's candidate(s) before their own nominee has been selected. In both cases, the FEC found that certain types of spending for this purpose was attributable to Sec. 441a(d) limits. The spending subject to these rulings and held accountable to limits is identical in character to the Republican Committee's spending to defeat Congressman Wirth in the general election.

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[2] *See* n [1] 5, *infra*.

1. Advisory Opinion 1984-15

Advisory Opinion 1984-15 involved advertisements proposed by the Republican National Committee in connection with the 1984 Presidential elections. The advertisements would have aired before and after the Democratic Party nominating convention, but before the selection of the Republican nominee (who was, of course, not in doubt). They would have featured a prominent candidate for the Democratic nomination and would have contained statements attacking the candidate's positions on issues and his record.

~~T~~The FEC first held that the ads could be considered Sec. 441a(d) coordinated expenditures, since "nothing in the Act, its legislative history, Commission regulations or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." The test propounded by the FEC to determine whether expenditures would, in fact, count toward Sec. 441a(d) limits was whether the expenditures were made "for the purpose of influencing the outcome of the general election. . . ."

As the FEC made clear in this ruling, expenditures made with a genuine general election-influencing purpose count against Sec. 441a(d) limits regardless of whether a nominee has been selected or even clearly identified. The FEC stated: "(W)hether a specific nominee has been chosen, or a candidate assured of nomination, at the time the expenditure is made, is immaterial." [3] The Commission therefore concluded that the ads proposed by the Republicans required allocation to Sec. 441a(d) limits since

[3] The FEC has frequently noted also that a party committee need not coordinate Sec. 441a(d) expenditures with its own nominee for the Senate and thus can make such expenditures before its nominee is selected. *See, e.g.*, A.O. 1975-120, 1 Fed. Elec. Camp. Fin. Guide (CCH) Para. 5186.

> (t)he clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party . . . nominee and to garner support for whoever may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to (a single federal office) and seek to influence a voter's choice between the Republican Party . . . candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. The only election which will pose such a choice is the . . . general election. These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election.

(Citation omitted.) Because the expenditures were made to benefit the eventual nominee in the general election, they must be allocated to Sec. 441a(d) limits.[4]

In holding that Sec. 441a(d) limits applied, the FEC distinguished so-called "generic" party building advertisements. Such ads do not count toward limitations attributable to any particular candidate, but these ads may not identify "by visual or audio content . . . any specific candidate or office." The facts of this Complaint simply do not support any attempted argument by the Republican Committee that The Ads are in any way "generic." [5]

[4] *See also* 11 C.F.R. Sec. 106.1(a) (Expenditures on behalf of candidates must be attributed "in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived.")

[5] It is of political significance that in April of this year, the Republican Committee responded to an FEC inquiry into whether certain expenditures reflected on its year-end report required allocation to a specific candidate. The Republican Committee denied that allocation was required, on the ground that the expenditures in question involved "voter education" relating to the 1986 general election at a time when there were no candidates for federal office in that election. Of course, if (as may well be the case) some of these

The similarity of the facts of this complaint to those underlying the main holding of the Advisory Opinion is striking. The Ads involve an attack on the record and positions of a clearly identified [6] candidate of the opposition party for a single office the United States Senate. Although made before a nominee had been selected by either party, the clear purpose of the ads is to influence the general election, since voters will not have an opportunity to decide between the Democratic and Republican nominees until the general election.[7]

1. Advisory Opinion 1985-14

A ruling by the FEC subsequent to Advisory Opinion 1984-15, Advisory Opinion 1985-14, confirms the teaching of the former. There, the Democrats proposed certain media ads and direct mailings critical of the Republican Party and, in some cases, particular Members of Con-

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expenditures were made to prepare for the anti-Wirth campaign undertaken this year, the Republican Committee is wholly wrong about the legal consequences of its acts. The funds spent for this campaign, whenever spent, are allocable to the Sec. 441a(d) general election spending limit.

[6] "Clearly identified" is defined by FEC regulations as an "unambiguous reference," such as where the name of a candidate appears. 11 C.F.R. Sec. 100.17.

[7] The one distinction between the facts of A.O. 1984-15 and of this Complaint is, in the Commission's words, "immaterial." In A.O. 1984-15, the candidate seeking the nomination of the Republican Party, the party making the ads, was assured of the nomination, while the candidate against whom the ads were to be made was arguably involved in a contested nomination. Here, the candidate against whom the ads have been made is apparently assured of the nomination, while there were several candidates seeking the Republican nomination. The holding of the Opinion applies to either set of facts: where the expenditures are for the purpose of influencing the general election, as they must be where nongeneric ads are run criticizing a potential opponent in the general election, Sec. 441a(d) limits apply. The benefit to the Republican nominee in this case is indisputable.

gress. The Comission concluded generally that ads which did not identify a particular Congressman, office or election, would qualify as generic party building expenditures, not subject to any limitation.[8]

Where, however, the proposed direct mailing involved reference to a particular Member of Congress by name, and distribution within "all or part" of that Member's Congressional District, the FEC concluded that the

> expenditures for producing and disseminating the mailer either with or without the "Vote Democratic" statement will be subject to the Act's limitations and attributable pursuant to 11 C.F.R. 106.1.

The ruling is unequivocal: direct mail such as that directed by Respondent against Congressman Wirth is allocable to limits where it identifies by name the candidate under attack, critiques his or her performance in office or position on issues, and its distribution to the voting constituency."

In so holding, the FEC noted that the declared purpose of the mailing, stated by the Democratic party committee requesting the Advisory Opinion, was to "influenc(e) voter perceptions of these candidates with a view toward weakening their positions as candadates for reelection." This purpose, together with the identification of a particular Member, requires a finding that the spending is attributable to the limits of Sec. 441a(d) under the criteria set out in Advisory Opinion 1984-15.

It is important to note that there is no requirement in either Advisory Opinion 1984-15 or Advisory Opinion 1985-14 that the advertisement, to be attributable, must contain "express advocacy." "Express advocacy" is a term

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[8] The one exception was the proposed advertisement which referred to "Your Republican Congressman" and included the tag line "Vote Democratic". In this case, the FEC vote was split 3-3 and the Opinion did not reach the issue.

of art under the FECA, 11 C.F.R. 109.1(b)(2). In Advisory Opinion 1984-15, the FEC recognized that an advertisement was attributable where it "effectively" advocated the defeat of a candidate. In Advisory Opinion 1985-14, the FEC, interpreting Advisory Opinion 1984-15, stated the requirement that an allocable communication include "an electioneering message." The Opinion, in turn, defined "electioneering message" as one "designed to urge the public to elect a certain candidate or party," *citing United States v. United Auto Workers*, 352 U.S. 567, 587 (1957). On the facts of that particular case, the FEC identified a clear "electioneering message" in direct mailings which clearly identified a Member of Congress and which were distributed within the Member's district with the stated purpose of influencing his or her re-election prospects.

The Republican Committee ads which form the basis of this complaint clearly fall within this category of expenditures—and must be attributed to limitations under the FECA. The Ads identify and criticize Congressman Wirth unambiguously and have been distributed to 100,000 voters throughout Colorado. Since the Senate race involves a state-wide election, this distribution is directed toward the electorate that will be asked to choose between the Republican and Democratic nominees in the United States Senate general election.

Further, The Ads were aired and distributed by the Republican Committee with the clear purpose to influence the general election, by attacking Congressman Wirth—a candidate whom the party will not directly oppose until the general election. Attachment H. Douglas Goodyear, the Republican political director in Colorado, is reported in a May 21, 1986 Associated Press article to have described the Phone Ads as designed as "a diversion (which) gives the GOP time to select a candidate to face Wirth in the general election campaign." Attachment 1.

V. CONCLUSION

This Complaint does not present complex legal issues. It presents a single issue of compliance by the Republican Committee with Sec. 441a(d) limits on its general election spending. The FEC has ruled on precisely this issue. It has done so twice and in the clearest of terms. This precedent is binding on the Republican Committee which cannot conceivably, on indisputable facts, avoid the application of general election spending limits to its anti-Wirth spending.

Under those circumstances, the FEC must not delay in holding the Respondent to these limits. This case should be prosecuted on an expedited basis to assure that these limits are observed from now through Election Day. The amount spent by the Republican Committee to date on these anti-Wirth advertisements must be determined to the dollar and then deducted from the limit still available to the Republican Party under Sec. 441a (d) to influence the Colorado Senate race.

Moreover, because the law is clear, service by the FEC of this complaint on the Respondent should operate as notice that its spending is accountable under Sec. 441a (d). From that day forward, *any* spending by the Republican Committee in defiance of those limits will be viewed by Complainant as a knowing and wilful violation of the FECA requiring FEC referral to the Justice Department or, at the least, an agency finding of aggravated wilful misconduct together with the imposition of appropriately severe remedial action as provided in such cases under the statute. 2 U.S.C. Sec. 437g(d)(1). Complainant will pursue this matter fully in cooperation with the FEC until Respondent obeys the law.

On the basis of the foregoing, the Colorado State Democratic Party requests that the FEC:

1. Conduct on an expedited basis an investigation of the facts and determine the exact dollar

amounts of the anti-Wirth spending by the Republican Committee;

2. Enter into a prompt conciliation with Respondents to remedy the violations alleged in this Complaint, and most importantly, to assure that the expenditures made to date are accounted for under Sec. 441a(d) limits and that the Respondent is notified that its remaining Sec. 441a(d) limit is no more than the difference between these expenditures and the published Sec. 441a (d) limits; and
3. Impose any and all penalties grounded in violations alleged in this Complaint.

Respectfully submitted,

/s/ M. Buie Seawell
Colorado State Democratic Party

[Notary Omitted in Printing]

[FEC Logo]

FELERAL ELECTION COMMISSION
Washington, D.C. 20463

November 13, 1986

Jan Baran, Esquire
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1776 K Street N.W.
Washington, D.C. 20006

RE: MUR 2186
The Colorado Republican
Federal Campaign Committee and
Vincent Zarlengo, as treasurer

Dear Mr. Baran:

The Federal Election Commission previously notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on November 5, 1986, determined that there is reason to believe that your clients have violated provisions of the Act.

Specifically, it appears that the disbursements made by your clients for a radio advertisement discussing defense issues (*See* Complaint at Attachment C) were found to be expenditures in connection with the general election for senator in the State of Colorado, and thus appear to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A). Thus, the Commission found reason to believe the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Additionally, the Commission considered allegations regarding other ads noted in the com-

plaint, but failed to pass a motion to find reason to believe your clients violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with these ads.

Your response to the Commission's initial notification of this complaint did not provide complete information regarding the matters in question. Please submit answers to the enclosed questions and the requested documents within fifteen days of receipt of this letter. Statements should be submitted under oath.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, requests for pre-probable cause conciliation will not be entertained after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of General Counsel is not authorized to give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Patty Reilly, attorney assigned to this matter, at 376-8200.

Sincerely,

/s/ Joan D. Aikens
JOAN D. AIKENS
Chairman

Enclosures
Procedures
Questions and Document Request

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

PLAINTIFF FEDERAL ELECTION COMMISSION'S REPLY TO DEFENDANTS' COUNTERCLAIM

I. The plaintiff Federal Election Commission ("the Commission" or "FEC"), through its undersigned counsel, responds as follows to the counterclaim asserted by defendants, the Colorado Republican Federal Campaign Committee, *et al.*, in this litigation:

COMPULSORY COUNTERCLAIM

47. Paragraph 47 of defendants' Answer contains conclusions of the pleaders, including conclusions of law, and defendants' characterizations of the matters of which they complain. With respect to those conclusions and characterizations, no response is required. To the extent that a response may be deemed necessary, however, plaintiff denies that this Court has original jurisdiction of this counterclaim pursuant to 28 U.S.C. § 1331 and its pendent and ancillary jurisdiction.

48. In response to Paragraph 48 of defendants' Answer, the plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment that defendants could or would have made expenditures directly in connection with the general election campaign for the Office of United States Senator from the State of Colorado that exceeded the limits established by 2 U.S.C. § 441a(d), other than with respect to those expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado in excess of the limits of 2 U.S.C. § 441a(d) that defendants did make. With respect to the averment that defendants could and would make such expenditures in connection with future general election campaigns, the Commission is without knowledge or information sufficient to form a belief as to the truth of the averment. All other allegations in Paragraph 48 are denied.

49. In response to Paragraph 49, plaintiff admits that the radio advertisement known as Wirth Facts #1 was one of several advertisements concerning Tim Wirth that were purchased and aired by the defendants during approximately the same time period. Plaintiff denies the remainder of the allegations of Pargraph 49 of defendants' Answer.

50. Paragraph 50 of defendants' Answer includes statements of law not requiring a response, and each and every other averment therein is denied.

51. Paragraph 51 of defendants' Answer includes statements of law not requiring a response, and each and every other averment therein is denied.

52. Paragraph 52 of defendants' Answer includes statements of law not requiring a response, and each and every other averment therein is denied.

53. As to Paragraph 53 of defendants' Answer, the allegation that the Commission has initiated enforcement proceedings against the State Party for an alleged violation of 2 U.S.C. § 441a(d) is denied. Plaintiff admits that, in a matter under review with the Commission that arose from an administrative complaint filed with the Commission pursuant to 2 U.S.C. § 437g(a)(1), the FEC found probable cause to believe that the State Party and Douglas L. Jones, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). Plaintiff admits that 2 U.S.C. § 441a(d) does not violate the United States Constitution and that the Commission has a continuing obligation to enforce the Federal Election Campaign Act, of which 2 U.S.C. § 441a(d) is a part. All other allegations contained in Paragraph 53 are denied.

II. Plaintiff further denies all allegations, in the counterclaim not heretofore admitted or denied, or to which plaintiff has not specifically responded, and pleads the following affirmative defenses:

1. The Court is without subject matter jurisdiction with respect to defendants' counterclaim;

2. Defendants' counterclaim fails to state a claim upon which relief can be granted.

3. Defendants' counterclaim is barred by sovereign immunity.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission requests the Court to:

1. Enter judgment in favor of plaintiff Federal Election Commission and dismiss defendants' counterclaim in its entirety;

2. Award the Commission its costs in this litigation; and

3. Grant the Commisison such other and further relief as may be appropriate.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Ivan Rivera
IVAN RIVERA
Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
Attorney

For the Plaintiff
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

October 19, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

STATEMENT OF UNDISPUTED FACTS AND SUPPORTING EXHIBITS

Defendants Colorado Republican Federal Campaign Committee ("State Party") and its treasurer, Douglas L. Jones, in support of their motion for summary judgment submit the following statements of undisputed facts and citations to supporting Exhibits, attached hereto. An Exhibits Index follows for reference.

STATEMENTS OF UNDISPUTED FACTS
AND CITATION TO SUPPORTING EXHIBITS

1. The State Party is an unincorporated political association, funded by voluntary contributions from individuals who support its purpose of advancing the goals and values of the Republican Party. *See* Exhibit 6, at p. 9.

2. In early 1986, the State Party became aware that Democratic Congressman Tim Wirth was aggressively attempting to mislead Coloradans as to his official conduct in Washington, claiming that he had favored conservative Republican positions when, in fact, he had pursued liberal Democratic policies. *See* Exhibit 8.

3. The State Party responded with three radio ads and two pamphlets setting the record straight and calling on Congressman Wirth to stop dissembling as to his official conduct. *See* Exhibits 2 and 8.

4. Wirth Facts #1 was aired only between April 4 and April 13, 1986. *See* Exhibit 4, Attachment 6 and Exhibit 5, Admission 12.

5. The primary election contest for the nominees for United States Senator in both the Republican and Democratic Parties was held on August 12, 1986. *See* Exhibit 5, Admission 11.

6. The General election for the office of United States Senator from Colorado was held on November 4, 1986.

7. The text of Wirth Facts #1 was as follows:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.
>
> *See* Exhibit 2, Attachment C.

8. The State Party paid $15,000 to air this advertisement, and reported this payment in its disclosure reports on file with the Federal Election Commission. *See* Exhibit 4, Response to Interrogatory No. 6 and Attachment 6.

9. The text of the ("Wirth Facts #2") second radio ad was as follows:

> Ringing phone.
>
> Voice: "When it comes to telephone service, a lot has changed in the last few years—none of it for the better."
>
> Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion.

So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial Tone.

See Exhibit 2, Attachment D.

10. The text of the third radio ad ("Wirth Facts #3") was as follows:

Paid for by the Colorado Republican State Central Committee

There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R. 5158 gave "legislative sanction to the divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking-up the phone company was a bad idea, but as far as we could tell that's what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts."

See Exhibit II, Attachment 10

11. The Commission does not dispute that the information communicated by the State Party's materials was accurate, fair, and important. *See* Exhibit 5, p. 5.

12. On June 12, 1986, two months before the Democratic Primary, the Colorado Democratic Party filed a complaint asserting that each of the advertisements were subject to 2 U.S.C. § 441a(d)(3) and that the State Party thus violated the Act. *See* Exhibit 2.

13. Defendants responded to the complaint and the Commission's findings showing that Wirth Facts #1 was not subject to 2 U.S.C. § 441a(d)(3), and that if it was, the limits imposed by section 441a(d)(3) were unconstitutional, both facially and as applied. *See* Exhibits 11 & 12.

14. The Federal Election Commission reviewed the Complaint, and conducted an investigation, and concluded on a divided vote that "Wirth Facts #1" reflected an "expenditure in connection with the general election campaign" that was held in November, seven months after the ad last ran, and thus fell within Section 441a(d)(3) of the Federal Election Campaign Act of 1971, as amended ("Act"), 2 U.S.C. 441a(d)(3). *See* Exhibit 7.

15. 2 U.S.C. § 441a(d) states that:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a state who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator . . .
>
> (i) 2 cents multiplied by the voting age population of the State. . . .

16. The State Party assigned its Section 441a(d)(3) spending limit to the National Republican Senatorial Committee ("NRSC"). *See* Exhibit 4.

17. Because the State Party had assigned to the NRSC the limited amount of expenditures allowed to it by Section 441a(d)(3), the Commission concluded that the expenditure for Wirth Facts #1 only was excessive under Section 441a(f). *See* Exhibits 2 and 7.

18. The Commission concluded that the State Committee's financial reports had misclassified the payment for Wirth Facts #1 in violation of Sections 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). *See* Exhibit 7.

19. The Commission voted 3-3 on the issue of whether there was reason to believe that the other ads violated 2 U.S.C. § 441a(f). *See* Exhibit 7.

20. 2 U.S.C. § 434(b)(4)(H)(v) states that a political committee must report "any other disbursements" not otherwise covered by the reporting provisions of the Act. The State Party complied with this requirement. *See* Exhibit 5, Admission 10.

21. Upon being ordered by the Court to explain the basis for the Commission's different treatment of Wirth Facts #1, the best the Commission could offer was the speculation that some members of the Commission perceived an "electioneering message" in Wirth Facts #1 that they did not perceive in the other ads or pamphlets. *See* Exhibit 9.

22. The Commission was unable or unwilling to identify particular language that conveyed that "electioneering message" during the discovery process. *See* Exhibit 9.

23. The Commission is unable to identify any time during the entire term of office of Congressman Wirth that the State Party could have paid for Wirth Facts #1 without risking the charge made in this suit. *See* Exhibit 9.

24. To avoid further such charges, the State Party has been forced to refrain from political expression. *See* Exhibits 2 and 10.

25. Within the limits imposed on it by Section 441a(d)(3), the State Party regularly makes expenditures in connection with general elections for federal office either directly or by assigning its expenditure limits to the National Republican Congressional Committee or the NRSC as appropriate. *See* Exhibit 2.

26. But for those statutory limits, the State Party would have made greater expenditures in connection with the 1986 general election for U.S. Senator from Colorado, and would do so in future general elections. *See* Exhibits 2 and 10.

27. The only justification that the Commission has identified for preventing the State Party from making such additional expenditures is 'preventing actual or apparent corruption of the political process." *See* Exhibit 9.

28. There is no evidence that financial expenditures by the State Party here, or state parties in general, pose any unique or specific hazards of corruption.

29. There is no evidence that would justify limiting the amount of such spending.

30. Political action committees and individuals may make unlimited expenditures expressly advocating the election or defe[a]t of candidates in general elections for federal office.

31. Each of the documents attached hereto are fair and accurate copies of genuine originals.

Respectfully submitted,

/s/ Jan Witold Baran
JAN WITOLD BARAN
THOMAS W. KIRBY
CAROL A. LAHAM

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Attorneys for the Colorado
Republican Federal Campaign
Committee and Douglas L. Jones,
as Treasurer

Date: May 14, 1990

INDEX TO EXHIBITS

EXHIBITS	DESCRIPTION
1	Federal Election Commission's (Plaintiff) Complaint for Declaratory, Injunctive and Other Appropriate Relief, July 5, 1989
2	Colorado Republican Federal Campaign Committee and Douglas L. Jones' (Defendants) Answer and Counterclaims, August 21, 1989
3	Plaintiff Federal Election Commission's Reply to Defendants' Counterclaim, October 19, 1989
4	Defendants' Responses to Plaintiff's First Set of Discovery Requests, November 29, 1989
5	Plaintiff Federal Election Commission's Response to Defendants' First Set of Discovery Requests, January 2, 1990
6	Defendants' Responses to Plaintiff's Second Set of Discovery Requests, January 22, 1990
7	Plaintiff Federal Election Commission's Response to Defendants' First Request for the Production of Documents, February 2, 1990
8	Defendants' Supplemental Responses to Plaintiff's Second Set of Discovery Requests, Interrogatory Nos. 6 and 7, April 16, 1989
9	Plaintiff Federal Election Commission's Supplemental Response to Defendants' First Set of Discovery Requests, April 16, 1990
10	Affidavit of Bruce Benson
11	Response of the State Party to the Administrative Complaint, August 15, 1986
12	Response of the State Party to the General Counsel's probable cause brief, December 17, 1987

COLORADO MEDIA GROUP INC.
Suite 326 . 5670 South Syracuse Circle
Englewood, Colorado 80111
(303) 779-3090

INVOICE

No: 5269

DATE: April 25, 1986

TO: Republican State Central Committee
1275 Tremont Place
Denver, CO 80204

Explanation of Services:

CRFCC Check #1166, 4-2-86 for Radio Buy	−15,000.00
Total media placed, per attached report	13,968.61
Radio production, Wirth Facts #1, 4-2-86	232.03
Station dubs (30)	129.34
Express mail (dubs to 19 stations)	204.25
Misc expenses (delivery, long distance, mileage expenses)	65.00

CREDIT BALANCE: $ −400.77

(Refund enclosed, CMG Check #1837, $400.77)

THANKS!

COLORADO MEDIA GROUP INC.

RSCC Radio Buy
Wirth Facts #1
April 4-13, 1986

Station	City	Stnd. Gross	RSCC @5%	No. Spots	Dates on Air
KOA	Denver	2550.00	2275.88	22	April 4-12
KNUS	Denver	600.00	535.50	15	April 7-13
KEZW	Denver	1080.00	963.90	40	April 4-13
KDEN	Denver	436.00	389.13	12	April 4-10
KOSI	Denver	1900.00	1695.75	12	April 4-10
KBRQ AM & FM	Denver	450.00	401.63	15	AM-April 4-10
				15	FM-April 4-10
KYGO FM	Denver	840.00	749.70	12	April 4-10
KVOD	Denver	1040.00	928.20	16	April 4-10
KLZ	Denver	635.00	566.74	12	April 4-10
KSSS-AM, KVUU-FM	Colo Spgs	1113.00	993.35	21	AM-April 7-13
				21	FM-April 7-13
Bob Hix:					
KCMN	Colo Spgs	336.00	299.88	21	April 7-13
KRLN	Canon City	178.50	159.31	21	April 7-13
KLOV	Loveland	378.00	337.37	21	April 7-13
KAYK	Pueblo	105.00	93.71	21	April 7-13

RSCC Radio Buy
Wirth Facts #1
April 4-13, 1986

Station	City	Stnd. Gross	RSCC @ 5%	No. Spots	Dates on Air
John McGuire:					
KFTM	Ft Morgan	94.00	83.90	14	April 7-13
KSLV	MonteVista	95.00	84.79	10	April 7-11
KIDN	Pueblo	192.00	171.36	12	April 7-12
KIIX	Ft Collins	192.00	171.36	12	April 7-12
KRDO AM-FM	Colo Sprgs	1175.00	1048.69	35	April 7-13
Rocky Mt Broadcast:					
KVOR-AM	Colo Sprgs	580.00	517.65	15	AM-April 7-11
& KSPZ-FM				15	FM-April 7-11
KTMG	Deertrial	50.00	44.63	15	April 7-11
KSPK	Walsenburg	38.00	33.92	5	April 7-11
KKCS Radio	Colo Sprgs	420.00	374.85	14	April 7-13
KCCY Radio	Pueblo	288.00	257.04	12	April 7-12
Intermountain Network:					
KCOL-FM	Ft Collins	299.20	267.04	16	April 7-13
KCSJ	Pueblo	185.60	165.65	16	April 7-13
KNAB	Burlington	166.40	148.51	16	April 7-13
KCRT-AM	Trinidad	76.00	67.83	16	April 7-13
KSTC-AM	Sterling	158.40	141.37	16	April 7-13
	TOTALS:	15651.10	13968.61	536	

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CHECK 1031

1837

4-25-86 CMG#5269 Refund due, RSCC Radio Buy 4-2 77-794 400.77

$ 400.77

COLORADO MEDIA GROUP, INC.
5670 South Syracuse Circle Suite 326
(303) 779-3090
Englewood, Colorado 80111

ARAPAHOE BANK AND TRUST
Englewood, Colorado 80112
82-195/1070

CHECK 1837

PAY TO THE ORDER OF Four hundred and 77-100 ---------- DATE April 25, 1986 Dollars AMOUNT $ 400.77

Colo. Republican Federal Campaign Comm.
1275 Tremont Place
Denver, CO 80204

AUTHORIZED SIGNATURE

⑈001837⑈ ⑆107001957⑆ 10 47572⑈

103

571-5792

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

PLAINTIFF FEDERAL ELECTION COMMISSION'S RESPONSE TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS

The plaintiff Federal Election Commission (the "Commission" or "FEC"), through its undersigned counsel, responds to defendants' first set of discovery requests in this litigation as follows:

INTERROGATORIES

1. Specify the Commission's basis for distinguishing between the advertisements known as Wirth Facts #1 and each of the other advertisements which were the subject of the complaint filed by M. Buie Seawell and designated Matter Under Review 2186.

Response. The Commission has made no finding distinguishing between Wirth Facts #1 and the other advertisements cited in the complaint.

2. Specify each compelling government interest asserted by the Commission in support of the constitutionality of 2 U.S.C. § 441a(d) and identify by document, author, title, date, and page number, each source of documentary evidence relied upon by Plaintiff to evidence each such interest.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff. Further, plaintiff objects on the grounds that the

interrogatory is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

3. Identify by date, state, names of persons involved, and documentary sources of information any examples of problems involving corruption by a State party and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is vague, confusing, vexatious, unduly burdensome, and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

4. Identify every instance in the legislative history of the Federal Election Campaign Act of 1971, as amended where Congress received evidence of corruption by a State Party.

Response. Plaintiff objects to this interrogatory on the grounds that it is vague, confusing, vexatious, unduly burdensome, and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects on the grounds that the subject matter of the discovery request, the legislative history of the Federal Election Campaign Act, consists of published reports equally accessible to defendants as to plaintiff.

5. State whether omission of the phrase "has a right to run for the Senate, but he" from Wirth Facts #1, with all other facts remaining the same, would have avoided the alleged violation of the Act.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this interrogatory on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff.

6. Identify by name and party affiliation each person whose election was advocated by Wirth Facts #1, and explain the basis for each such identification.

Response. Plaintiff objects to this interrogatory on the grounds that the text of Wirth Facts #1 speaks for itself. Plaintiff further objects on the grounds that this interrogatory seeks disclosure of the conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving these objections, plaintiff states that Wirth Facts #1 advocated the defeat of Tim Wirth.

7. Identfy each party that was active in Colorado in 1986.

Response. Plaintiff objects to this interrogatory on the grounds that it is vague, irrelevant, vexatious, unduly burdensome, and irksome. Without waiving this objection, plaintiff states that the two major parties active in Colorado in 1986 were the Republican party and the Democratic party.

8. Distinguish the status of Wirth Facts #1 under Section 441a(d) from the status of the other ads identified in the administrative complaint, explaining in detail why one and not the others led to the present charges.

Response. Plaintiff objects to this interrogatory on the grounds that it is irrelevant to the issues in this case. Without waiving this objection, plaintiff states that the Commission found reason to believe the Colorado Repub-

lican Federal Campaign Committee and its treasurer violated specified provisions of the Federal Election Campaign Act with respect to the advertisement known as Wirth Facts #1. Subsequently, the Commission made findings of probable cause to believe violations occurred, and later authorized the filing of the present civil action; these Commission actions are described with specificity in the complaint that commenced the present suit. The Commission made no finding of reason to believe that a violation occurred with respect to the other ads referenced in this interrogatory; likewise no finding of probable cause to believe nor any suit authorization was made by the Commission with respect to those other ads. The Commission, like any other agency with law enforcement responsibilities, may exercise such prosecutorial discretion as it or its members deem appropriate.

9. State the factual basis for imposing the constraints of section 441a(d) on a State Party.

Response. Plaintiff objects to this interrogatory on the grounds that the statute in question speaks for itself, as does the legislative history of that statute. Plaintiff further objects to this interrogatory on the grounds that it calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

10. Identify by date, authors, title, and summary, each report generated by the General Counsel's Office to the Federal Election Commission with regard to MUR 2186, excepting those portions of the reports which address conciliation.

Response. August 5, 1986—Charles N. Steele, Lawrence M. Noble, Patty Reilly—First General Counsel's Report—recommended giving Colorado Republican Federal Campaign Committee and its treasurer an additional fifteen days in which to respond to the administrative complaint.

(Each one of the following reports was entitled "General Counsel's Report.")

October 24, 1986—Charles N. Steele, Lawrence M. Noble—recommended that the Commission find reason to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv), on the grounds that respondents made disbursements that were expenditures in connection with the general election for United States Senator from Colorado and that were therefore subject to the limitations of 2 U.S.C. § 441a(d), but were not properly reported as such. The report also recommended that certain questions be asked of the respondents.

May 28, 1987—Lawrence M. Noble—recommends that the Commission find reason to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. § 441a(d)(3)(A), by making expenditures in connection with the general election for United States Senator from Colorado that, coupled with expenditures made by the National Republican Senatorial Committee, authorized by the Colorado Republican Federal Campaign Committee, exceeded the limitations of that statutory section.

December 3, 1987—Lawrence M. Noble, Lois G. Lerner—recommends that respondents be given additional time in which to file a responsive brief.

February 5, 1988—Lawrence M. Noble, Lois G. Lerner—advises the Commission that brief has been received from respondents.

May 20, 1988—Lawrence M. Noble, Patty Reilly—recommends that the Commission find probable cause to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

August 24, 1988—Lawrence M. Noble, Patty Reilly—recommends declining respondents' motion to reconsider the finding of probable cause to believe and recommends finding probable cause to believe that Michael V. Spillane, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

November 18, 1988—Lawrence M. Noble, Patty Reilly—recommends that the Commission find probable cause to believe that Douglas L. Jones, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

March 16, 1989—Lawrence M. Noble, Patty Reilly—recommends that the Commission authorize the Office of the General Counsel to file a civil suit in the United States District Court against the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer.

11. Describe in detail any respect in which Wirth Facts #1 was false or misleading.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, plaintiff states that the Commission made no findings or allegations concerning the truth or falsity of the advertisement.

12. Describe in detail any respect in which Wirth Facts #1 was unfair.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, plaintiff states that the Commission made no findings or allegations concerning the fairness of the advertisement.

13. Explain in detail any appearance of corruption that was presented by the State Party's financing of Wirth Facts #1.

Response. Plaintiff objects to this interrogatory on the grounds that this interrogatory seeks disclosure of the conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving this objection, plaintiff states that the Commission made no findings or allegations concerning the appearance of corruption.

14. Identify with specificity each other group operating that was publicizing the information stated in Wirth Facts #1 in Colorado between February and May, 1986.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, plaintiff states that it does not know whether any other group was publicizing the information in question at the time in question.

15. State whether the Commission contends that the "in connection with" standard of section 441a(d) involves an examination of subjective intent and, if so, state all such evidence of the subjective intent of the State party with respect to Wirth Facts #1.

Response. Plaintiff objects to this interrogatory on the grounds that this interrogatory seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

16. Explain how the alleged likelihood that Congressman Wirth would be unopposed was relevant to the determination in April, 1986, of whether expenditures for Wirth Facts #1 would be covered by section 441a(d).

Response. Plaintiff objects to this interrogatory on the grounds that this interrogatory seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving its objection, plaintiff states that the fact that defendants knew by April 1986 that Tim Wirth would be the Democratic party nominee for the United States Senate in the 1986 general election is relevant to the fact that in April 1986 they made expenditures in connection with that general election and in oposition to Mr. Wirth's candidacy.

17. State the latest date in 1985 or 1986 on which the State Party could have financed the broadcast of Wirth Facts #1 without any risk that the Commission would contend that the expenditure fell within section 441a(d), and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this interrogatory on the grounds that is seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff.

18. State whether an expenditure by one state party made for the purpose and with the effect of influencing the nominee for U.S. Senator of another state party is within section 441a(d), and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

19. State whether an expenditure made by a state party for the purpose and with the effect of persuading a candidate of another state party for U.S. Senate to refrain from dishonest campaign tactics is subject to section 441a(d), and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this interrogatory on the grounds that it seeks disclosure of the conclusions, opinions, or legal theories of counsel for the plaintiff.

20. State whether the Commission exercises discretion in deciding which charges of the type made in this complaint it will pursue and, if so, explain in detail the standards the Commission applies to guide that discretion.

Response. The Commission may pursue enforcement of matters generated by complaints or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities when it determines, by an affirmative vote of at least four of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of the Federal Election Campaign Act or chapter 95 or chapter 96 of title 26 of the United States Code. Like any other agency with law enforcement responsibilities, the Commission may exercise such prosecutorial discretion as it or its members deem appropriate.

21. Identity by name, address, title, relationship to the Commission, and, expected testimony any witness you expect to call at trial.

Response. Plaintiff objects to this interrogatory on the grounds that it is untimely. Under Local Rule 404, Local Rules D. Colorado, pretrial orders shall follow the "Instructions for Preparation and Submission of Pretrial Order," set forth at Appendix C to the Local Rules, D. Colorado. Under that provision, witnesses are to be identified in the Pretrial Order. Accordingly, it is premature to request this information during this early phase of discovery.

REQUESTS FOR ADMISSION

1. Admit that the Colorado Republican Party ran three radio advertisements and two mailers which were the subject matter of Matter Under Review ("MUR") 2186.

Response. Denied as stated. Admit that the Colorado Republican Party ran three radio advertisements and at least two brochures which were referred to in the administrative complaint that generated MUR 2186.

2. Admit that the Colorado Republican Party never denied running the three radio advertisements and two mailers which were the subject of MUR 2186.

Response. Plaintiff, despite reasonable inquiry, is without sufficient information to admit or deny this Request for Admission. It is admitted, however, that the Colorado Republican Party never denied to the Commission that it ran the advertisements and mailers in question.

3. Admit that the Federal Election Commission did not find reason to believe that two of the three radio advertisements and the two mailers violated any provisions of the Federal Election Campaign Act of 1971, as amended.

Response. Admitted that the Federal Election Commission made no finding with respect to two of the three radio advertisements and the two brochures referred to in the administrative complaint. To the extent that this Request for Admission may be understood as requesting an admission that the Commission made any finding with respect to the two advertisements and the two brochures in question, it is denied.

4. Admit the Federal Election Commission distinguished "Wirth Facts #1" from the advertisements which were the subject of MUR 2186 based solely on the content of "Wirth Facts #1."

Response. Denied. The Federal Election Commission made no finding distinguishing Wirth Facts #1 from any other advertisements.

5. Admit that the only basis for distinction between "Wirth Facts #1" and the other advertisements which were the subject of the MUR was the content of "Wirth Facts# 1."

Response. Denied. The Federal Election Commission made no finding distinguishing Wirth Facts #1 from any other advertisements.

6. Admit that Tim Wirth was an incumbent Congressman in 1986.

Response. Admitted.

7. Admit there is a compelling public interest in assuring that constituents are fully informed of any attempts by an incumbent Federal Congressman to deceive them.

Response. Plaintiff objects to this Request for Admission on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this Request for Admission on the grounds that it seeks disclosure of

the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff.

8. Admit that an important role of any state party is to act as a watch dog over that State's incumbent Federal Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it is hypothetical, irrelevant, vague, confusing, and vexatious.

9. Admit that, for the past two decades, more than 90% of incumbent Federal Congressmen have won reelection when they chose to run for reelection.

Response. Plaintiff objects to this Request for Admission on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects on the grounds that the Request for Admission is improper, in that defendants seek to require plaintiff to undertake research and analysis respecting the results of elections for Congress over a twenty year period; the purpose of a Request for Admission, however, is not to require investigation into novel areas of inquiry, but to narrow the issues already in dispute.

10. Admit that the State Party reported the costs for "Wirth Facts #1" as an operating expenditure on the Colorado Republican Federal Campaign Committee's 1986 July 15 Quarterly Report at Schedule B, page 1 of 1 for line 19, item A.

Response. Admitted; but deny that such reporting satisfied the requirements of the Federal Election Campaign Act.

11. Admit that the primary for the Democratic nomination for United States Senator from the State of Colorado in 1986 was not held until August 12, 1986.

Response. Admitted.

12. Admit that "Wirth Facts #1" was aired only between April 4, 1986 and April 13, 1986.

Response. Admitted that defendants have, in response to discovery requests by plaintiff, provided documentation showing that Wirth Facts #1 was aired between April 4, 1986, and April 13, 1986. Plaintiff is without knowledge of any other occasions on which Wirth Facts #1 may have been aired.

13. Admit that "Wirth Facts #1" was aired four months prior to the 1986 primary election for United States Senator in Colorado.

Response. Admit that defendants have, in response to discovery requests by plaintiff, provided documentation showing that Wirth Facts #1 was aired between April 4, 1986, and April 13, 1986. Plaintiff is without knowledge of any other occasions on which Wirth Facts #1 may have been aired. Admitted that the ads aired between April 4, 1986, and April 13, 1986, were aired approximately four months prior to the 1986 primary election for United States Senator in Colorado.

14. Admit that one effect of the Federal Election Campaign Act of 1971, as interpreted by the Commission in this case, is to protect incumbents from organized and financed criticism by the State Party.

Response. Denied.

15. Admit that, during April, 1986, no one could be certain who would be the Democratic candidate for United States Senator from Colorado.

Response. Denied.

16. Admit that predicting the outcome of primary elections more than four months in advance is difficult at best.

Response. Plaintiff objects to this Request for Admission on grounds of vagueness, and on grounds that it is

hypothetical and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

17. Admit that, as of April, 1986, the State Party could not be sure who would be the Democratic nominee in the general election for U.S. Senator from Colorado.

Response. Denied.

18. Admit that, prior to the adoption of the Act, State parties were permitted to make unlimited expenditures criticizing incumbents.

Response. Plaintiff objects to this Request for Admission on the grounds that it is vague, confusing, vexatious, unduly burdensome, and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

19. Admit that, prior to the adoption of the Act, state parties regularly made expenditures criticizing the conduct of incumbent Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it is vague, confusing, vexatious, unduly burdensome and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

20. Admit that one effect of the Act is to reduce spending by State Parties to criticize incumbent Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it is hypothetical, speculative, vague, confusing, vexatious, unduly burdensome, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not

reasonably calculated to lead to the discovery of admissible evidence.

21. Admit that there is no corruption or appearance of corruption when a State Party spends money to criticize the conduct of an incumbent Congressman.

Response. Plaintiff objects to this Request for Admission on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff. Further, plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Also, plaintiff objects on the grounds that this Request for Admission seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the aforesaid objections, plaintiff states that a judgment concerning the issue raised by this Request for Admission must take into account specific factual circumstances.

22. Admit that public policy favors open and robust criticism of incumbent Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff. Further, plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Also, plaintiff objects on the grounds that this Request for Admission seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the afore-

said objections, plaintiff states that a judgment concerning the issue raised by this Request for Admission must take into account specific factual circumstances.

23. Admit that the Act would not restrict expenditures for the dissemination of Wirth Facts #1 made by a bona fide, independent trade union.

Response. Plaintiff objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff also objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

24. Admit that the Act would not restrict expenditure for the dissemination of Wirth Facts #1 made by a bona fide, independent political study group.

Response. Plaintiff objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

25. Admit that the Colorado State Democratic Party understood section 441a(d) to apply to all of the advertisements identified in its complaint.

Response. Plaintiff objects to this Request for Admission on the grounds that it asks plaintiff to make an admission as to what another party understood.

26. Admit that one or more members of the Commission voted against finding reason to believe that the violations charged in the present complaint had occurred.

Response. Admitted.

27. Admit that honest political advocacy is protected by the First Amendment.

Response. Plaintiff objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff also objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

28. Admit that the violations charged in the present complaint are *malum prohibitum* and not *malum in se*.

Response. Plaintiff objects on the grounds that the terms cited in the Request for Admission are commonly used for purposes of analysis of offenses in the field of criminal law; since the present case is civil, and not criminal, the terms cited have no relevance here. Without waiving its objection, plaintiff states that it has never alleged that the violations at issue in this action should be characterized as "*malum in se*."

29. Admit that the residents of Colorado have a compelling interest in assuring the honesty of the U.S. Congressman from Colorado.

Response. Plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Plaintiff also objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

30. Admit that the expenditure of funds by a State Party to criticize the official conduct of a member of Congress from that state does not, in itself, give rise to any appearance of impropriety.

Response. Plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving the aforesaid objections, plaintiff states that a judgment concerning the issue raised by this Request for Admission must take into account specific factual circumstances.

31. Admit that, but for the restrictions imposed by the Act that are at issue in this case, the State Party would have spent additional funds in connection with the 1986 general election for U.S. Senator from Colorado.

Response. Plaintiff objects to this Request for Admission on the grounds that it requests plaintiff to make an admission concerning what another party might have done in the past given a hypothetical set of circumstances. Obviously, plaintiff is without the knowledge necessary to form an opinion concerning such a matter.

32. Admit that, but for the restrictions imposed by the Act that are at issue in this case, the State Party would seek to raise and spend funds in excess of the amounts allowed by the Act in connection with general elections for U.S. Senator from Colorado.

Response. Plaintiff objects to this Request for Admission on the grounds that it requests plaintiff to make an admission concerning what another party might do in the future given a hypothetical set of circumstances. Obviously, plaintiff is without the knowledge necessary to form an opinion concerning such a matter.

33. Admit that state parties within a given state often vary in their ability to raise funds for expenditure in connection with general elections to the U.S. Congress.

Response. Plaintiff objects to this Request for Admission on the grounds that it is hypothetical, speculative, vague, confusing, unclear, vexatious, unduly burdensome, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

34. Admit that the state parties in Colorado differ in their ability to raise funds for expenditure in connection with general elections to the U.S. Congress.

Response. Plaintiff objects on the grounds that this Request for Admission is speculative, vague, confusing, unclear, vexatious, unduly burdensome, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection, plaintiff states that it is without sufficient information to make such an assessment.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Ivan Rivera
IVAN RIVERA
Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
Attorney

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January 2, 1990

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

DEFENDANTS' RESPONSES TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS

The defendants hereby respond to the plaintiff's second set of discovery requests. In an effort to avoid needless controversy, defendants, occasionally have provided information in response to an objectionable request or interrogatory. This voluntary information is without prejudice to any objection.

ADMISSIONS

Request for Admission No. 1

Admit that David Grace's name did not appear on the ballot as a candidate for the Democratic Party's nomination for United States Senator from Colorado in the primary held on August 12, 1986.

Response to Request for Admission No. 1

Registered Republicans in the state of Colorado were given only a Republican Party Ballot in the August 12, 1986 primary election held for the Republican Party's nomination for United States Senator from Colorado. Further, the State Party is not in possession of a Democratic Party Ballot for the August 12, 1986 Democratic primary election. Therefore, the State Party is without knowledge and information sufficient to form a belief as to the truth of this statement.

Request for Admission No. 2

Admit that David Grace did not file with the Commission a written designation of a political committee to

serve as his principal campaign committee in connection with the 1986 election for United States Senator from Colorado.

Response to Request for Admission No. 2

The State Party is without knowledge and information sufficient to form a belief as to the truth of this statement. Upon information and belief, this information is in the actual possession of the FEC.

Request for Admission No. 3

Admit that no political committee purporting to be the principal campaign committee of David Grace in connection with the 1986 election for United States Senator from Colorado registered with or reported to the Commission.

Response to Request for Admission No. 3

The State Party is without knowledge and information sufficient to form a belief as to the truth of this statement. Upon information and belief, this information is in the actual possession of the FEC.

Request for Admission No. 4

Admit that Tim Wirth was the only candidate whose name appeared on the ballot in the primary election held August 12, 1986, for the Democratic Party's nomination for United States Senator from Colorado.

Response to Request for Admission No. 4

Registered Republicans in the state of Colorado were given only a Republican Party Ballot in the August 12, 1986 primary election held for the Republican Party's nomination for United States Senator from Colorado. Further, the State Party is not in possession of a Democratic Party Ballot for the August 12, 1986 Democratic

primary election. Therefore, the State Party is without knowledge and information sufficient to form a belief as to the truth of this statement.

Request for Admission No. 5

Admit that the Colorado Republican Federal Campaign Committee represents itself as, and is, a State committee of the Republican Party. (*See* Exhibit A.)

Response to Request for Admission No. 5

Admitted that the State Party is a State Committee of the Republican Party. *See also* Response to Request for Admission No. 12 of the plaintiff's first set of discovery requests.

Request for Admission No. 6

Admit that the purposes for which the Colorado Republican Federal Campaign Committee exists is to help elect Republican candidates for political office in the State of Colorado.

Response to Request for Admission No. 6

Admitted that the Colorado Republican Federal Campaign Committee exists for several constitutionally protected purposes, including the following: to ensure that incumbent Congressmen from the state of Colorado are held accountable to their constituents; to freely engage in political speech and association protected by the First Amendment to the United States Constitution; to promote the public good by advocating sound principles of, and high standards for, public governance; and to help elect Republican candidates for political office in the State of Colorado.

Request for Admission No. 7

Admit that you authorized the National Republican Senatorial Committee to serve as your agent for the pur-

pose of making expenditures allowed under 12 U.S.C. § 441a(d)(3) in connection with the 1986 general election campaign for United States Senator from Colorado in order that such expenditures would help elect whoever was the Republican candidate in that election.

Response to Request for Admission No. 7

As stated in paragraph 36 of the State Party's Answer in this case,

> Defendants admit that the Colorado Republic Party authorized the National Republican Senatorial Committee to serve as its agent for the purpose of making expenditures under 2 U.S.C. § 441a(d)(3) but deny all further allegations.

Request for Admission No. 8

Admit that you authorized the National Republican Senatorial Committee to serve as your agent for the purpose of making expenditures allowed under 2 U.S.C. § 441a(d)(3) in connection with the 1986 general election campaign for U.S. Senator from Colorado on March 14, 1986. (*See* Exhibit B.)

Response to Request for Admission No. 8

Admitted that Exhibit B attached to Plaintiff's Second Set of Discovery Requests is a true and accurate copy of an authentic document that speaks for itself.

INTERROGATORIES

Interrogatory No. 1

For each Request for Admission which you have not admitted, specify the grounds and facts which you contend support your refusal to admit the truth of the matter asserted therein, identify all persons having knowledge of such facts, and identify all records relating to or reflecting such grounds and facts.

Response to Interrogatory No. 1

Virtually all of the denials were based on a lack of information, thus making compliance with this request impossible. The grounds and facts which the State Party contends supports its denials in this matter have been specified in the State Party's Answer and Counterclaim in this matter and in the foregoing responses. Defendants object that the requirement that it identify "all" persons having knowledge of such facts, and that it identify "all" records relating to or reflecting such grounds and facts is overbroad and unduly burdensome, but state that persons with knowledge of the facts of this matter include the Commission, the Commission Staff, Senator Wirth and his staff, M. Buie Seawell, David Grace, and residents of Colorado in 1986, and that relevant documents include those referred to in the foregoing responses to plaintiff's request for admission.

Interrogatory No. 2

In your response to Request for Admission No. 6 of the Plaintiff's First Set of Discovery Requests, with respect to the brief signed by the Commission's General Counsel on September 28, 1988, and sent to Douglas L. Jones, treasurer of the Colorado Republican Federal Campaign Committee, you "denied that such brief stated the position of the General Counsel or [sic] the legal and factual issues of the case." State with specificity the grounds and facts which you contend support the aforesaid denial, identify all persons having knowledge of such facts, and identify all records relating to or reflecting such grounds and facts.

Response to Interrogatory No. 2

Defendants were requested to admit that

> the Commission's General Counsel notified Douglas L. Jones by letter dated September 28, 1988, (*See* Exhibit 7) that the General Counsel was prepared

> to recommend that the Commission find probable cause to believe that Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, had violated the Act, and provided him with a brief stating the position of the General Counsel in [sic] the legal and factual issues of the case. (*See* Exhibit 8.)

Defendants appropriately

> [a]dmitted that Exhibit 8 is a true and accurate copy of an authentic document that speaks for itself and that Mr. Jones was provided with a General Counsel's Supplemental Brief which speaks for itself, but denied that such brief stated the position of the General Counsel or the legal and factual issues of the case.

The denial that, "such brief stated the position of the General Counsel or the legal at factual issues of the case" reflected the very limited scope of the document, which did not address most issues in the case. Defendants object that the requirement that it identify "all" persons having knowledge of such facts, and that it identify "all" records relating to or reflecting such grounds and facts is overbroad and unduly burdensome, but state that persons with knowledge of the facts of this matter include the Commission and the Commission Staff, and that relevant documents include those referred to in the foregoing responses to plaintiff's request for admission.

Interrogatory No. 3

Identify the persons who established the Colorado Republican Federal Campaign Committee and state specifically when they did so.

Response to Interrogatory No. 3

The Colorado Republican Federal Campaign Committee was established by the Colorado Republican Party

after the institution of the Federal Election Commission. The Colorado Republican Federal Campaign Committee filed its initial Statement of Organization with the Federal Election Commission in February, 1976. As indicated by that document, on file with the Federal Election Commission, the original chairman of the Committee was William Willoughby, and its initial Treasurer was Jim Manuel.

Interrogatory No. 4

State the purposes for which the Colorado Republican Federal Campaign Committee was established, and identify all documents and records that evidence, set forth, or describe those purposes.

Response to Interrogatory No. 4

The State Party has been unable to locate its Bylaws dating to 1976. However the Bylaws of the Colorado Republican State Central Committee adopted April 13, 1978, to be effective June 1, 1978 state the purpose as follows:

> The purpose of this organization shall be to perform the functions set forth in the election laws of the State of Colorado and to exert every effort to achieve the objectives of the Republican Party as reflected in the Republican State Platform and in the rules and platform adopted by the Republican National convention.

Interrogatory No. 5

State whether the Colorado Republican Federal Campaign Committee is incorporated. If so, identify the state and date of incorporation. Identify all documents relating to your corporate status, including, but not limited to, articles of incorporation and registration forms filed with any governmental agency.

Response to Interrogatory No. 5

The Colorado Republican Federal Campaign Committee is not incorporated.

Interrogatory No. 6

Identify the person who made the decision, or who participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1."

Response to Interrogatory No. 6

Objection, the specific identity is irrelevant since the role of the State Party is not in dispute. Without waiving this objection, no individual currently employed by the Colorado Republican Party made the decision, or participated in the decision to produce "Wirth Facts #1." Thus, the Colorado Republican Federal Campaign Committee is without knowledge and information sufficient to attest to the information requested.

Interrogatory No. 7

State the purposes for which "Wirth Facts #1" was produced and aired. Identify all records and documents, including, but not limited to, internal memoranda, letters, and minutes of meetings, that evidence, set forth, or describe those purposes.

Response to Interrogatory No. 7

Defendants object that the subjective intent of its representatives with respect to Wirth Facts #1 is irrelevant, as demonstrated by the Commission's failure to inquire into such subject or matters before initiating this case. Without waving that objection, no individual currently employed by the Colorado Republican Party participated in the decision to produce "Wirth Facts #1" and thus cannot attest to the subjective purposes for which "Wirth Facts #1" was produced and aired. Viewed objectively, Wirth Facts #1 served to inform the residents of Colorado of the conduct of an incumbent Congressman and to call for honesty in public affairs.

Defendants object that the requirement that it identify "all" records and documents, including but not limited to, internal memoranda, letters, and minutes of meetings, that evidence, set forth, or describe the subjective purposes behind "Wirth Facts #1" is irrelevant, unduly burdensome and overbroad. Without waiving that objection, defendants are not aware of any such documents. The objective purposes are evident from Wirth Facts #1 itself.

Interrogatory No. 8

Identify the person or persons who appoint the treasurer of the Colorado Republican Federal Campaign Committee.

Response to Interrogatory No. 8

The treasurer of the Colorado Republican Federal Campaign Committee is appointed by the Chairman of the Colorado Republican Party.

Interrogatory No. 9

Identify the person or persons who appoint the chairman of the Colorado Republican Federal Campaign Committee.

Response to Interrogatory No. 9

The structure of the Colorado Republican Party is statutorily provided for by the State of Colorado. *See* Colorado Rev. Stat. § 1-3-103 (1988). The Chairman of the Colorado Republican Party is the Chairman of the Colorado Republican Federal Campaign Committee.

Interrogatory No. 10

State whether the Colorado Republican Federal Campaign Committee has ever supported, endorsed, or made

contributions to any candidate in any general election for federal office who was not a Republican.

Response to Interrogatory No. 10

Objection, irrelevant. Without waiving that objection, the disclosure reports on file with the Federal Election Commission will indicate whether the Colorado Republican Federal Campaign Committee has made contributions to any candidate in any general election for federal office who was not a Republican. They are in the actual possession of the Commission. The current employees of the Colorado State Party are unable to attest with certainty whether the Colorado Republican Federal Campaign Committee has *ever* supported or endorsed any candidate in any general election for federal office who is not a Republican. As a general proposition, the Colorado Republican Party supports Republican policies and candidates.

Interrogatory No. 11

If the answer to the preceding interrogatory was affirmative, identify all such candidates and state with particularity the nature of the support, endorsement, or contributions such candidates received from the Colorado Republican Federal Campaign Committee.

Response to Interrogatory No. 11

See Response to Interrogatory No. 10 above.

Interrogatory No. 12

Identify all persons who decided, or participated in the process of deciding, which candidates for federal office the Republican Federal Campaign Committee would support in 1986.

Response to Interrogatory No. 12

Objection, irrelevant. Without waiving that objection, the present employees of the Colorado Republican Party cannot attest with certainty who decided or participated in the process of deciding which candidates for federal office the Colorado Republican Federal Campaign Committee would support in 1986.

I declare under penalty of perjury that the foregoing interrogatories and answers are true and accurate to be best of my information, knowledge, and belief.

/s/ John S. Dorrenbacher
JOHN S. DORRENBACHER

OBJECTIONS AND CONTRIBUTIONS ARE BY COUNSEL:

/s/ Jan W. Baran
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Attorneys for the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as Treasurer

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BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and VINCENT A. ZARLENGO, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of November 5, 1986, do hereby certify that the Commission took the following actions in MUR 2186:

1. *Decided by a vote of 5-1* to find reason to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) for failure to allocate for the cost of the "Defense" radio ad.

   Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

2. *Failed in a vote of 3-3* to pass a motion to find reason to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with all of the other ads indentified in the complaint.

   Commissioners McDonald, McGarry, and Thomas voted affirmatively for the motion; Commissioners Aikens, Elliott, and Josefiak dissented.

3. *Decided by a vote of 6-0* to direct the Office of General Counsel to send the letter attached to the General Counsel's report and include appropriate questions.

Commissioners Aikens, Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision.

Attest:

Date 11-6-86

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

THE COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and VINCENT ZARLENGO, as treasurer

CERTIFICATION

I, Mary W. Dove, recording secretary for the Federal Election Commission executive session on June 9, 1987, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in the above-captioned matter:

1. Find reason to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. § 441a(d)(3)(A).
2. Approve the letter attached to the General Counsel's report dated May 28, 1987.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision. Commissioner Aikens dissented.

Attest:

6-10-87
Date

/s/ Mary W. Dove
MARY W. DOVE
Administrative Assistant

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO FEDERAL CAMPAIGN COMMITTEE and VINCENT ZARLENGO, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of June 14, 1988, do hereby certify that the Commission took the following actions in MUR 2186:

1.
2. *Decided by a vote of 5-1* to
   a) Find probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f).
   b) Direct the General Counsel to send the appropriate letter and conciliation agreement pursuant to the above actions.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decisions; Commissioner Aikens dissented.

Attest:

6-15-88
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of September 13, 1988, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in MUR 2186:

1. Decline to grant the motion for reconsideration filed by Colorado Republican Federal Campaign Committee and Mr. Jones, as treasurer.
2. Direct the Office of General Counsel to send an appropriate letter pursuant to the above action.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

Attest:

9-13-88
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of January 10, 1989, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in MUR 2186:

1. Find probable cause to believe Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, violated 2 U.S.C. §§ 434 (b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a (f).
2. Approve the letter and concilation agreement attached to the General Counsel's report dated November 18, 1988.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

Attest:

Jan. 12, 1989
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of April 7, 1989, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in MUR 2186:

1.

2. Authorize the Office of the General Counsel to file a civil suit in the United States District Court against the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer.

3. Approve the letter attached to the General Counsel's report dated March 16, 1989.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

Attest:

4-7-89
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION,
Plaintiff,

vs.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

DEFENDANTS' SUPPLEMENTAL RESPONSES TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS, INTERROGATORY NOS. 6 AND 7

The defendants hereby submit these supplemental responses to the plaintiff's second set of discovery requests, interrogatory nos. 6 and 7.

INTERROGATORIES

Interrogatory No. 6

Identify the person who made the decision, or who participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1."

Response to Interrogatory No. 6

Upon information and belief, several persons participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1." A person who was directly and personally involved, and who made the final decision was Howard "Bo" Callaway, former Chairman of the Colorado Republican Party. As Chairman of the Colorado Republican Party, Bo Callaway

was the individual ultimately responsible for the decision to produce and air the advertisement.

Interrogatory No. 7

State the purposes for which "Wirth Facts #1" was produced and aired. Identify all records and documents, including, but not limited to, internal memoranda, letters, and minutes of mettings, that evidence, set forth, or describe those purposes.

Response to Interrogatory No. 7

Defendants have previously stated the objective purpose of Wirth Facts #1. Mr. Callaway, who no longer has any position with the Committee, is believed knowledgeable concerning the subjective intent of himself and, perhaps, others.

Further, a search of the existing records and documents of the Colorado Republican Party has been made and the following documents responsive to this request have been located: Press Conference Statement of Bo Callaway, and Statement of Bo Callaway dated April 4, 1986.

I declare under penalty of perjury that the foregoing interrogatories and answers are true and accurate to be best of my information, knowledge, and belief.

/s/ John Dorrenbacher
JOHN DORRENBACHER

April 16, 1990

[Colorado Party Logo]

COLORADO REPUBLICANS
1275 Tremont Place, Denver, Colorado 80204
(303) 893-1776

Howard H. Callaway
State Chairman

PRESS CONFERENCE STATEMENT
OF BO CALLAWAY

Based on recent political stories, I had not thought that I would be outraged by Tim Wirth's first political ads until at least June or July. However, his blatant attempt to reconstruct 11 years worth of a down-the-line liberal voting record has come early, and I feel compelled to respond.

I will limit my comments to his second ad, which quotes him regarding defense and economic issues. I will note, however, that anyone who is *at all* familiar with walking in snowshoes can see that his efforts in the first ad are extremely clumsy, and are not those of someone who regularly takes his family for hikes in the woods.

In the second ad Wirth states, "We need a strong defense. It's expensive, and we have to pay for it."

Based on that statement alone, the ad has become an instant entry in the 1986 Campaign Advertising Hall of Shame.

For 11 years, Tim Wirth has been one of the most ardent foes of revived American military capability. Forget the rhetoric in his ads. Look at what he has voted AGAINST:

—the B-1 bomber nine times,
—AWACS twice,
—the maneuverable re-entry vehicle (MaRV) twice,
—chemical weapons seven times,
—the F-18 twice,

—nuclear-powered aircraft carriers seven times,
—the Lance missile once,
—the neutron bomb three times,
—the MX missile at least seventeen times,
—the C-5 cargo plane once,
—anti-satellite weapons (ASATs) twice, and
—the M-2 fighting vehicle once.

Combine those votes with the following:

—his 1983 statement in the Rocky Mountain News that, "It's absolutely criminal the amount of money this country is spending on defense."
—his cosponsorship of a bill that would allow conscientious objectors to avoid having their taxes used by the Defense Department and other military related agencies.
—his vote to protect federal aid for students who refused to register with the Selective Service System.
—his 1984 anti-defense rhetoric featuring the fraudulent example of the Allen Wrench.
—his support for the 1984 Black Caucus budget proposal, which would have reduced defense spending by $203 billion.
—his poor ratings from defense and national security organizations such as the American Security Council, which gives Wirth a career rating of 9%, with Wirth actually getting a Zero in 1984.

As a West Point graduate, former congressman, and former Secretary of the Army, I can categorically tell you that Tim Wirth's record on defense issues is abysmal. It's too bad that he has only discovered the need for a strong national defense now that he's running for the Senate. His anti-defense attitude can be clearly documented over eleven years, and no amount of slick commercials or Hollywood hype can change that fact.

That's the first point. The second regards his statement that, "Cutting the federal budget is our highest priority and greates challenge."

Again, the conservative rhetoric simply doesn't match the record. Consider these actions:

—voting against a Balanced Budget Amendment to the Constitution, and calling it a "flim-flam" and "extremely dangerous."
—voting against line-item veto authority for the President when 43 governors are allowed to use that tool as a means to reduce spending.
—Chairing a Democratic Task Force that called for a massive 5-year Public Works Program (Denver Post's description, not mine) in 1982.
—voting against the U.S. Chamber of Commerce 60% of the time in 1983 and 1984, and against the National Association of Businessmen (self-styled Watchdogs of the Treasury) 100% of the time in 1983, which represents a fiscal conservative score of Zero.
—voting for the Black Caucus budget proposal in 1984, which would have reduced the deficit by increasing taxes a whopping $181 billion over a three-year period.

If Tim Wirth wants to vote the liberal line in Congress, that's fine. I will strongly disagree with his philosophy, but I will respect him for voting his conscience.

However, if his record is anti-defense and pro-spending, which it *clearly* is, he ought to acknowledge his liberal stripes and defend his record for what it is; liberal.

You can't have it both ways, Tim.

In Colorado, a man is only as good as his word. After viewing these ads, Coloradans should ask, "What are Tim Wirth's words worth?" With blatant disregard for the facts, he has purchased television time to baldly misstate his record on two key issues: defense and federal spending.

This press conference is to serve notice that Tim Wirth will not get away with it. His record will be scrutinized

as it has never been, and we in the Republican party are committed to letting the public know what Tim Wirth's record *really is.* Only then will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator.

[Colorado Party Logo]

COLORADO REPUBLICANS
1275 Tremont Place, Denver, Colorado 80204
(303) 893-1776

Howard H. Callaway
State Chairman

[April 4]

STATEMENT OF BO CALLAWAY

Two weeks ago I held a press conference and called Tim Wirth's first wave of advertising "a blatant attempt to reconstruct 11 years worth of a down-the-line liberal voting record."

I had hoped that the press conference would represent, in some small way, our attempt to set the record straight. But now that Tim Wirth has apparently decided to extend his TV buy, we in the Colorado Republican party feel that stronger measures are needed to combat this initial wave of shameless deceit and outright distortion. For that reason, we have decided to purchase radio time and state the unpleasant facts about Tim Wirth's record.

This is an investment in principle. There is no way we can match Tim Wirth's expenditures dollar-for-dollar. As long as he continues to extort outrageous sums from PACs, and special interests that his committee directly regulates, he will have a substantial money advantage in this race.

Nonetheless, we will oppose his attempts to run on a platform of thinly-veiled Republicanism with all the effort we can muster. His record on defense issues is clear. He has opposed every major weapons system during the past five years, and has regularly voted to make massive, irresponsible cuts in the defense budget.

His record on economic issues is equally as clear. His feeble attempt to portray himself as a fiscal conservative

is completely contradicted by his 11-year voting record, which includes votes against a Balanced Budget Amendment, against a line-item veto for the President, and regular support for tax increases.

It is bad enough for Colorado that Tim Wirth was an extremely liberal congressman for 12 years. It's even worse that he has deliberately chosen to mislead the voters by building a false image of himself.

As the elected spokesman for 535,000 registered Republicans in Colorado, I have an obligation to defend Republican philosophy from the campaign equivalent of cowbirds; politicians that try to take over our issues for temporary convenience, and then abandon them for liberal causes once the election is hatched.

As the radio ad states, Tim Wirth has a right to run for the US Senate. He does *not* have the right, however, to change the facts regarding his voting record based on what a media consultant tells him is necessary to win. Our ad represents an honest effort to set the facts straight. The voters in Colorado deserve no less.

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

PLAINTIFF FEDERAL ELECTION COMMISSION'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS

The plaintiff Federal Election Commission (the "Commission" or "FEC"), through its undersigned counsel, supplements its responses to defendants' first set of discovery requests in this litigation as follows:

INTERROGATORIES

1. Specify the Commission's basis for distinguishing between the advertisements known as Wirth Facts #1 and each of the other advertisements which were the subject of the complaint filed by M. Buie Seawell and designated Matter Under Review 2186.

Response. The administrative complaint filed by M. Buie Seawell and defendants' response thereto cited Wirth Facts #1 and two other radio advertisements paid for by defendants. With respect to Wirth Facts #1 (also known as the "Defense" radio ad), on November 5, 1986 the Commission decided by a vote of five to one to find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) for failure to allocate for the cost of the "Defense" radio ad. A motion was made at the same November 5, 1986 Commission meeting to also find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with the other ads identified in the administrative complaint. That motion, however, failed to pass by a vote of three to three, and no other motions

were made with respect to finding reason to believe the other two advertisements violated the Act. The three to three deadlock vote by the Commission is not an agency action within the meaning of 2 U.S.C. § 437g. Accordingly, the Commission made no findings with respect to the latter advertisements at all.

The only difference between the Commission's votes on Wirth Facts #1 and the other ads was that two of the five FEC Commissioners who voted to find reason to believe that defendants violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with Wirth Facts #1 later voted to find no reason to believe with respect to the other two advertisements. The remaining Commissioners voted the same (either reason to believe or no reason to believe) with respect to all the advertisements. No Statements of Reasons were issued by any of the Commissioners explaining any of their votes in the administrative enforcement matter, nor were such statements required. *Common Cause v. FEC*, 842 F.2d 436, 450-451 (D.C.Cir. 1988). In the absence of a strong showing of bad faith or improper behavior, inquiry into the mental processes of administrative decisionmakers is completely improper. Defendants have not even attempted to make such a showing here. In any event, none of the Commission's findings or votes in the administrative enforcement proceeding is subject to judicial review in this *de novo* litigation. *FEC v. National Conservative Political Action Committee*, Civil Action No. 85-2898 (D.D.C. April 29, 1987) (copy attached as FEC Exhibit 1).

Four FEC Commissioners found no distinction between Wirth Facts #1 and the two other radio advertisements; three found reason to believe with respect to all three advertisements and one found no reason to believe with respect those advertisements. Without waiving any of the foregoing objections, counsel for the Commission notes that although the remaining two Commissioners issued no statements of reasons for their different votes, it appears

that they voted against finding reason to believe with respect to the other advertisements primarily because they believed those advertisements contained no electioneering message.

2. Specify each compelling government interest asserted by the Commission in support of the constitutionality of 2 U.S.C. § 441a(d).

Response. The compelling governmental interest in preventing actual or apparent corruption of the political process supports the constitutionality of 2 U.S.C. § 441a(d).

5. State whether omission of the phrase "has a right to run for the Senate, but he" from Wirth Facts #1, with all other facts remaining the same, would have avoided the alleged violation of the Act.

Response. This question calls for the counsel for the Commission to speculate as to what the Commission might have done under different facts than were presented in this case. Without conceding that interrogatories seeking conclusions of law unrelated to the facts of the case are appropriate under the Federal Rules of Civil Procedure, the Commission notes that the Federal Election Campaign Act sets forth a procedure whereby any person may obtain an advisory opinion from the Commission concerning the application of the Act to any specific transaction or activity proposed by the requester. 2 U.S.C. § 437f(a). That provision specifies, however, that "[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section." 2 U.S.C. § 437f(b).

Since defendants have neither proposed undertaking the activity discussed in this interrogatory nor requested an advisory opinion pursuant to 2 U.S.C. § 437f, counsel for the Commission can only respond to the interrogatory by noting that the standard for determining whether an ex-

penditure comes within the limitations of 2 U.S.C. § 441a (d)(3) is whether it constitutes an expenditure in connection with the general election campaign of a candidate for Federal office. If the advertisement discussed in the interrogatory had been the subject of an administrative complaint, the Commission would have addressed the question whether the expenditure that financed this hypothetical ad was made in connection with the general election campaign of a candidate for federal office, just as it addressed that question with respect to the ads at issue in the administrative complaint. Since the Commission was not presented with that question, a more definitive answer to this interrogatory is not possible. However, as noted in the Commission's response to Interrogatory 1, the absence of the quoted language might well have led to a different vote by some Commissioners.

8. Distinguish the status of Wirth Facts #1 under Section 441a(d) from the status of the other ads identified in the administrative complaint, explaining in detail why one and not the others led to the present charges.

Response. The administrative complaint filed by M. Buie Seawell and defendants' response thereto cited Wirth Facts #1 and two other radio advertisements paid for by defendants. With respect to Wirth Facts #1 (also known as the "Defense" radio ad), on November 5, 1986 the Commission decided by a vote of five to one to find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) for failure to allocate for the cost of the "Defense" radio ad. A motion was made at the same November 5, 1986 Commission meeting to also find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with the other ads identified in the administrative complaint. That motion, however, failed to pass by a vote of three to three, and

no other motions were made with respect to finding reason to believe the other two advertisements violated the Act. The three to three deadlock vote by the Commission is not an agency action within the meaning of 2 U.S.C. § 437g. Accordingly, the Commission made no findings with respect to the later advertisements at all.

The only difference between the Commission's votes on Wirth Facts #1 and the other ads was that two of the five FEC Commissioners who voted to find reason to believe that defendants violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with Wirth Facts #1 later voted to find no reason to believe with respect to the other two advertisements. The remaining Commissioners voted the same (either reason to believe or no reason to believe) with respect to all the advertisements. No Statements of Reasons were issued by any of the Commissioners explaining any of their votes in the administrative enforcement matter, nor were such statements required. *Common Cause v. FEC*, 842 F.2d 436, 450-451 (D.C.Cir. 1988). In the absence of a strong showing of bad faith or improper behavior, inquiry into the mental processes of administrative decisionmakers is completely improper. Defendants have not even atempted to make such a showing here. In any event, none of the Commission's findings or votes in the administrative enforcement proceeding is subject to judicial review in this *de novo* litigation. *FEC v. National Conservative Political Action Committee*, Civil Action No. 85-2898 (D.D.C. April 29, 1987) (copy attached as FEC Exhibit 1).

Four FEC Commissioners found no distinction between Wirth Facts #1 and the two other radio advertisements; three found reason to believe with respect to all three advertisements and one found no reason to believe with respect those advertisements. Without waiving any of the foregoing objections, counsel for the Commission notes that although the remaining two Commissioners issued no statements of reasons for their different votes, it ap-

pears that they voted against finding reason to believe with respect to the other advertisements primarily because they believed those advertisements contained no electioneering message.

15. State whether the Commission contends that the "in connection with" standard of section 441a(d) involves an examination of subjective intent and, if so, state all such evidence of the subjective intent of the State party with respect to Wirth Facts #1.

Response. A *prima facie* showing of a violation of 2 U.S.C. § 441a(d)(3) does not require proof of the subjective intent of the persons alleged to have violated that provision by making an expenditure in excess of the statutory limit. Subjective intent, however, may be relevant to determining whether a violation of 2 U.S.C. § 441a(d) occurred.

In the present case, discovery has not yet been completed. Evidence relevant to the question of defendants' subjective intent uncovered to date consists of the following: defendants' use of funds from their federal account to pay for the ads; the fact that defendants' ad was, by its own terms, a response to an ad advocating the election of Tim Wirth to the United States Senate; the fact that Wirth Facts #1 contained an explicit reference to Wirth's candidacy for the U.S. Senate; and the fact that the defendant committee is a party organization that exists for the purpose of electing that party's candidates to political office.

17. State the latest date in 1985 or 1986 on which the State Party could have financed the broadcast of Wirth Facts #1 without any risk that the Commission would contend that the expenditure fell within Section 441a(d), and explain.

Response. This question calls for the counsel for the Commission to speculate as to what the Commission might have done under different facts than were presented in this case. Without conceding that interrogatories seeking conclusions of law unrelated to the facts of the case are appropriate under the Federal Rules of Civil Procedure, the Commission notes that the Federal Election Campaign Act established a procedure whereby any person may obtain an advisory opinion from the Commission concerning the application of the Act to any specific transaction or activity by the requester. 2 U.S.C. § 437f(a). That provision specifies, however, that "[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section." 2 U.S.C. § 437f(b).

Since defendants have neither proposed undertaking the activity discussed in this interrogatory nor requested an advisory opinion pursuant to 2 U.S.C. § 437f, counsel for the Commission can only respond that if the Wirth Facts #1 ad had been financed and aired on other dates in 1985 and 1986, and been the subject of an administrative complaint, the Commission would have addressed the question whether the expenditure that paid for the ad was made in connection with the general election campaign of a candidate for federal office, just as it addressed that question with respect to the ads which were the subject matter of the administrative complaint.

Without waiving any of the foregoing objections, counsel for the Commission notes that while the timing of an advertisement relative to the the other facts of a particular case can be relevant to the determination whether an expenditure is "in connection with the general election campaign or candidates for Federal office" under 2 U.S.C. § 441a(d), neither the statute nor the Commission's regulations establish any specific cut-off dates for use in making such determinations.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Robert W. Bonham, III
ROBERT W. BONHAM, III
Acting Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
Attorney

April 16, 1990

For the Plaintiff
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

COUNTY OF DENVER)
)
STATE OF COLORADO)

AFFIDAVIT OF BRUCE BENSON

BRUCE BENSON, being first duly sworn, deposes and says:

1. I am Bruce Benson. I have been the Chairman of the Republican Party of Colorado ("State Party") since 1987.

2. The registered federal account of the State Party is called the Colorado Republican Federal Campaign Committee and is the subject of this civil action brought by the Federal Election Commission.

3. The State Party fully intends to participate in the 1990 elections to be held in the State of Colorado. Further, the State Party intends to pay for communications within the spending limits of 2 U.S.C. section 441a(d).

4. However, the State Party would also like to pay for communications which costs exceed the spending limits of 2 U.S.C. section 441a(d), but will not do so due to the deterrent and chilling effect of the statute. In future elections the State Party similarly will be deterred from financing communications which costs exceed the spending limits of 2 U.S.C. section 441a(d).

5. These statutory limits are restricting the State Party from carrying on its role as the Republican Party of Colorado in that they are inhibiting the State Party from participating freely in the public debate surrounding elections for federal office.

/s/ Bruce Benson
BRUCE BENSON

[Notary Omitted in Printing]

WIRTH FACTS #1

The following is a transcript of the State Committee's radio broadcast discussing Congressman Wirth's positions on defense:

"Paid for by the Colorado Republican State Central Committee

Here in Colorado we're use to politicans who let you known where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

WIRTH FACTS #2

The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth' position on telecommunications policy:

* * *

Ringing phone.

Voice: "When it comes to telephone service, a lot has changed in the last few years—none of it for the better."

Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion.

So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts, Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial tone.

* * *

WIRTH FACTS #3

The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth's position on telecommunications policy and on the credibility of his statements on the issue:

"Paid for by the Colorado Republican State Central Committee

There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R.5158 gave "legislative sanction to the divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking-up the phone company was a bad idea, but as far as we could tell that' s what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts."

Tim Wirth Says He Wants A Strong Defense For America?

Then Why Doesn't

Tim Wirth is spending a lot of money these days to try and convince people in Colorado that he really wants our country to have a strong, modern military ready to defend our borders and our friends abroad.

☑ **NO** Wirth voted **against** the Strategic Defense Initiative program to protect America against Russian missiles. (Congressional Quarterly 164, June 30, 1985.)

☑ **NO** Wirth voted **against** building the new B-1 bomber to replace the outmoded B-52s that have been in our airforce since the Korean War. (Congressional Quarterly 149, May 23, 1984.)

☑ **NO** Wirth voted **against** funding important defense weapons 48 times since 1975. (The Congressional Record.)

He Vote That Way?

Thousands of dollars in slick television ads may change a few minds, but it can't change the facts.

Take a look at how Tim Wirth has voted on issues in Congress that directly affect the strength of our defense system.

☑ **YES** Wirth sponsored legislation to allow people who objected to the military **not to have their tax dollars pay for national defense.** (HR 3652, July 17, 1985.)

☑ **YES** Wirth voted to protect **draft dodgers** from having their college aid cut off by the Federal government. (Congressional Quarterly 311, July 20, 1982.)

☑ **YES** Wirth voted to cut $108 million from **civil defense** programs designed to protect non-military personnel. (Congressional Quarterly 215, July 31, 1982.)

"It's absolutely **criminal** the amount of money this country is spending on defense."

Congressman Tim Wirth

The Rocky Mountain News
May 21, 1983

Tim Wirth is the kind of politician who wants it both ways.

He wants the liberal, anti-defense crowd back in Washington to know that they can count on him when it comes time to kill any effort to modernize our military.

That's why in Congress, he's **voted against every major new weapons system in the past five years.**

But back here in Colorado, he wants folks to believe that he thinks America should have the best system of national defense that money can buy.

Which is the real Tim Wirth?

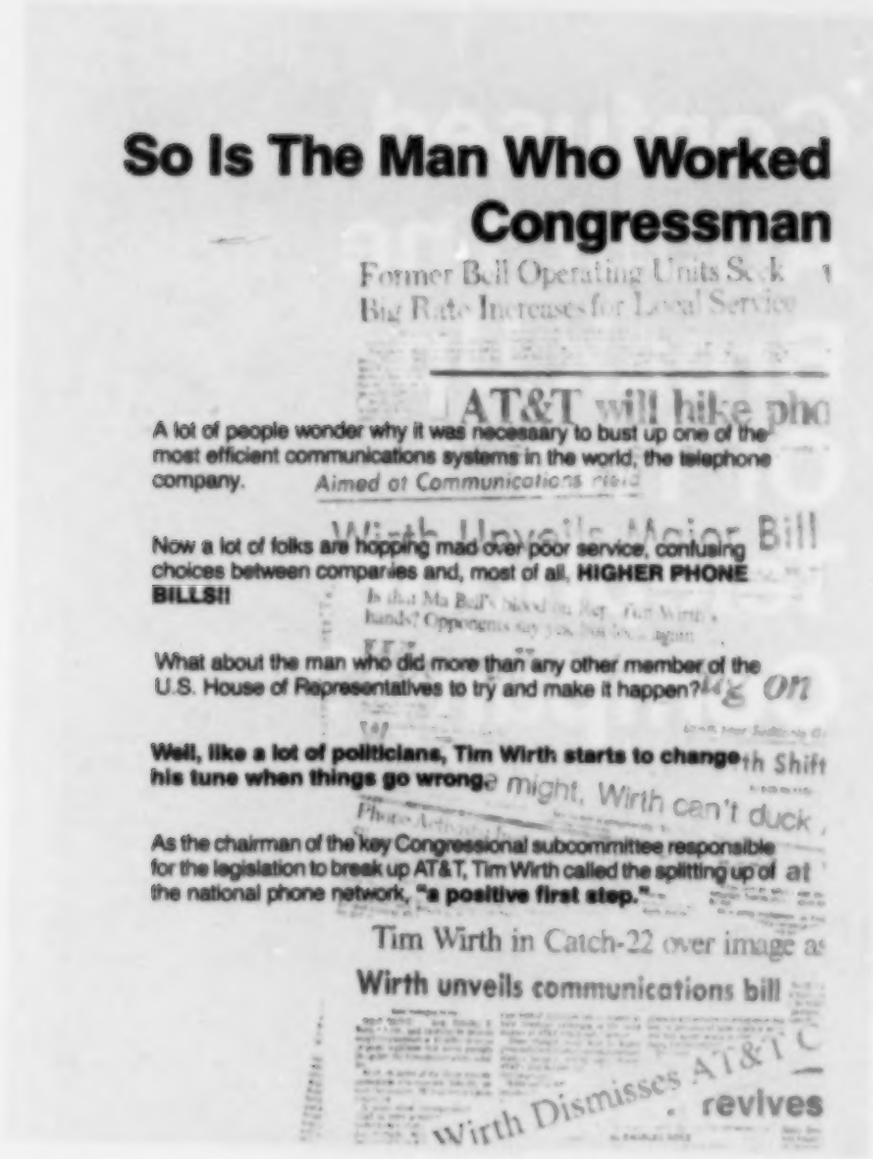
Check the record inside.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Finance Committee

Confused About The Break Up Of The Telephone Company?

So Is The Man Who Worked Congressman



A lot of people wonder why it was necessary to bust up one of the most efficient communications systems in the world, the telephone company.

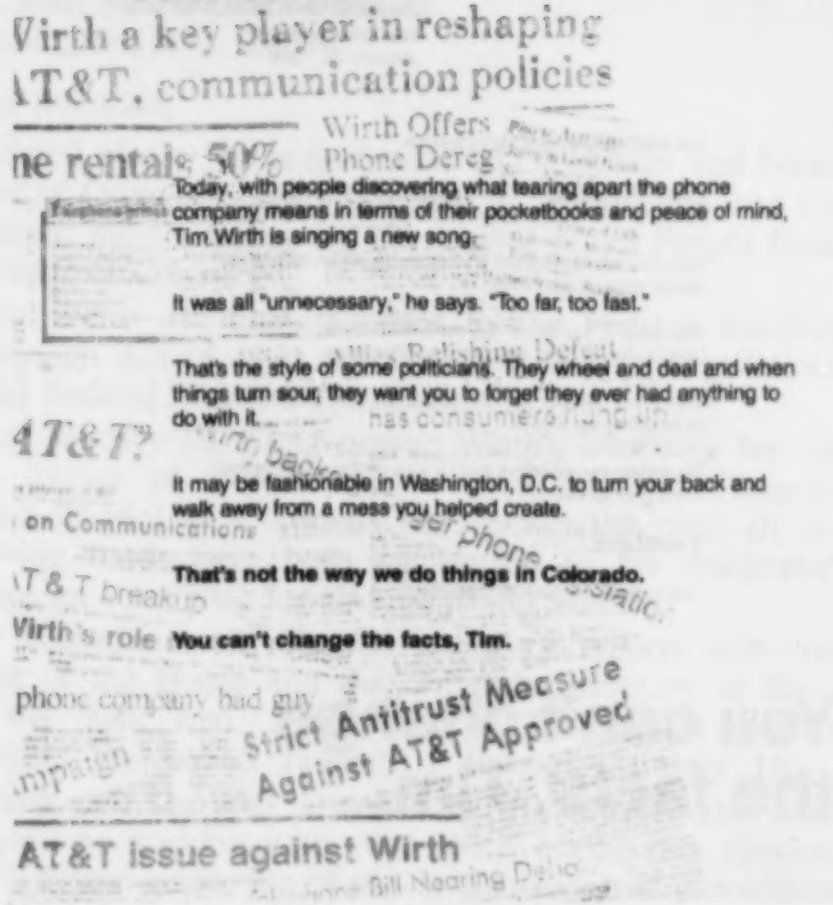
Now a lot of folks are hopping mad over poor service, confusing choices between companies and, most of all, **HIGHER PHONE BILLS!!**

What about the man who did more than any other member of the U.S. House of Representatives to try and make it happen?

Well, like a lot of politicians, Tim Wirth starts to change his tune when things go wrong.

As the chairman of the key Congressional subcommittee responsible for the legislation to break up AT&T, Tim Wirth called the splitting up of at the national phone network, **"a positive first step."**

The Hardest To Make It Happen
Tim Wirth



"Everyone I have spoken with thinks that the AT&T divestiture has been a disaster and that the Congressman (Tim Wirth) had a lot to do with it...if people hold him personally responsible for the telephone break up, he's going to have big problems."

Columnist David Ethan Greenberg
The Denver Post
January 12, 1986

Tim Wirth **does** have big problems.

People in Colorado are having big problems getting the kind of phone service they deserve and at a fair price.

With Tim Wirth's support and encouragement America's phone system was broken up.

The result is that we all pay more and pay for things we used to get for free, like directory information.

Tim Wirth wants you to forget the role he played in busting up AT&T.

He wants you to believe that it's all a mistake and he had nothing to do with it.

It won't work.

Coloradans are smarter than that.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Central Committee

WIRTH
Committee for Tim Wirth
P.O. Box 576
Westminster, Colorado 80030
[telephone number omitted]

January 16, 1986

The Honorable Joanne Coe
Secretary of the Senate
Office of Public Records
232 Hart Senate Office Building
Washington, D.C. 20510

Dear Ms. Coe:

Enclosed please find a Statement of Candidacy and Statement of Organization for Timothy E. Wirth, who has announced his candidacy for the United States Senate from the State of Colorado.

These forms are filed pursuant to the Federal Election Campaign Act of 1971, as amended, and the regulations of the Federal Election Commission.

As of January 16, Congressman Wirth's campaign for the U.S. House of Representatives from the 2nd Congressional District of Colorado was terminated, and all remaining funds have been transferred to his designated campaign committee for election to the Senate.

Our committee will file the necessary reports with the Clerk of the House and the Colorado Secretary of State for the Year End, 1985, and the Termination Report covering the period January 1 through January 16.

I thank you for your attention to this matter, and look forward to working with your office during this election year. Please advise me of any further required procedures regarding formal notification of Tim's candidacy.

Sincerely,

/s/ Joanne C. Bryant
JOANNE C. BRYANT
Treasurer

STATEMENT OF CANDIDACY

1 (a) Name of Candidate (in Full)

Timothy E. Wirth

(b) Address (Number and Street)

12 Chautauqua Park

(c) City, State and ZIP Code

Boulder, Colorado 80302

2 [illegible]

3 Party Affiliation

Democrat

4 Office Sought

United States Senate

5 District & State of Candidacy

Colorado

DESIGNATION OF PRINCIPAL CAMPAIGN COMMITTEE

6 I hereby designate the following named political committee as my Principal Campaign Committee for the 1986 election(s).
(Year of Election)

NOTE: This designation must be filed with the appropriate office noted below.

(a) Name of Committee (in Full)

Committee for Tim Wirth, Inc.

(b) Address (Number and Street)

P.O. Box 576

(c) City, State and ZIP Code

Westminster, Colorado 80030

DESIGNATION OF OTHER AUTHORIZED COMMITTEES

7 I hereby authorize the following named committee, which is NOT my principal campaign committee, to receive and expend funds on behalf of my candidacy.

NOTE: This designation should be filed with the principal campaign committee.

(a) Name of Committee (in Full)

(b) Address (Number and Street)

(c) City, State and ZIP Code

I certify that I have examined this Statement and to the best of my knowledge and belief it is true, correct and complete.

x Timothy E. Wirth
(Signature of Candidate)

January 16, 1986
(Date)

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Statement to the penalties of 2 U.S.C. §437g.

CANDIDATES FOR --

President mail to:	U.S. Senate mail to:	U.S. House of Representatives mail to:		
Federal Election Commission 1325 K Street, N.W. Washington, D.C. 20463	Secretary of the Senate 119 D Street, N.E. Washington, D.C. 20510	Clerk of the House 1036 Longworth Office Bldg. Washington, D.C. 20515	For further information contact:	Federal Election Commission Toll Free 800-424-9530 Local 202-523-4068

FEC FORM 2 (1/86)

NATIONAL REPUBLICAN
SENATORIAL COMMITTEE

SENATOR JOHN HEINZ
Chairman
TOM GRISCOM
Executive Director

AGREEMENT

By this agreement, the Colorado Republican Party authorizes the National Republican Senatorial Committee to serve as its agent for the purpose of making one hundred percent of the expenditures allowed under 2 U.S.C. 441a(d)(6) in the State of Colorado for the 1986 election for the United States Senate.

By the signature below, Howard H. Callaway hereby represents that s/he is authorized to enter into this agreement.

/s/ Howard H. Callaway
State Chairman

Date March 14, 1986

/s/ Scott Cottington
Political Director,
National Republican
Senatorial Committee

Date 3-24-86

REPORT OF RECEIPTS AND DISBURSEMENTS
For a Political Committee Other Than an Authorized Committee

(Summary Page)

1. Name of Committee (In Full)
Colorado Republican Federal Campaign Committee

Address (Number and Street)
1275 Tremont Place

City, State and ZIP Code
Denver, Co. 80204

☐ Check here if address is different than previously reported.

2. FEC Identification Number
C00033134

3. ☐ This committee qualified as a multicandidate committee during this Reporting Period on _____ (Date)

4. TYPE OF REPORT (Check appropriate box(es))

(a) ☐ April 15 Quarterly Report ☐ October 15 Quarterly Report
☒ July 15 Quarterly Report ☐ January 31 Year End Report
☐ July 31 Mid Year Report (Non-Election Year Only)
☐ Monthly Report for _____
☐ Twelfth day report preceding _____ _____ (Type of Election) election on _____ in the State of _____
☐ Thirtieth day report following the General Election on _____ in the State of _____
☐ Termination Report

(b) Is this Report an Amendment?
☒ YES ☐ NO

SUMMARY	COLUMN A This Period	COLUMN B Calendar Year-to-Date
5. Covering Period 11-1-84 through 6-30-85		
6.(a) Cash on hand January 1, 19 84		$ 32,881.69
(b) Cash on Hand at Beginning of Reporting Period	$ 277,597.85	
(c) Total Receipts (from Line 18)	$ 177,770.03	$ 498,599.71
(d) Subtotal (add Lines 6(b) and 6(c) for Column A and Line 6(a) and 6(c) for Column B)	$ 455,367.88	$ 531,281.40
7. Total Disbursements (from Line 28)	$ 249,058.05	$ 324,971.57
8. Cash on Hand at Close of Reporting Period (subtract Line 7 from Line 6(d))	$ 206,309.83	$ 206,309.83
9. Debts and Obligations Owed TO The Committee (Itemize all on Schedule C or Schedule D)	$	
10. Debts and Obligations Owed BY the Committee (Itemize all on Schedule C or Schedule D)	$ 120,716.00	

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Vincent A. Zarlengo
Type or Print Name of Treasurer

Vincent A. Zarlengo
SIGNATURE OF TREASURER

7/25/85
Date

For further information contact:
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
Toll Free 800-424-9530
Local 202 376-3120

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this report to the penalties of 2 U.S.C. § 437g

All previous versions of FEC FORM 3 and FEC FORM 3a are obsolete and should no longer be used.

FEC FORM 3X (3/80)

177

DETAILED SUMMARY PAGE
of Receipts and Disbursements
(Page 2, FEC FORM 3X)

Name of Committee (in Full): Colorado Republican Federal Campaign Committee

Report Covering the Period: From: 4-1-86 To: 6-30-86

	COLUMN A Total This Period	COLUMN B Calendar Year-To-Date	
I. RECEIPTS			
11. CONTRIBUTIONS (other than loans) FROM:			
(a) Individuals/Persons Other Than Political Committees	109,726.90	390,713.17	11(a)
(Memo Entry Unitemized $ 22,551.90)			
(b) Political Party Committees			11(b)
(c) Other Political Committees		700.00	11(c)
(d) TOTAL CONTRIBUTIONS (other than loans) (add 11(a), 11(b) and 11(c))	109,726.90	391,413.17	11(d)
12. TRANSFERS FROM AFFILIATED/OTHER PARTY COMMITTEES	50,000.00	78,800.00	12
13. ALL LOANS RECEIVED			13
14. LOAN REPAYMENTS RECEIVED			14
15. OFFSETS TO OPERATING EXPENDITURES (Refunds, Rebates, etc.)	47.15	47.15	15
16. REFUNDS OF CONTRIBUTIONS MADE TO FEDERAL CANDIDATES AND OTHER POLITICAL COMMITTEES			16
17. OTHER RECEIPTS (Dividends, Interest, etc.) Interest	26,995.98	28,939.39	17
18. TOTAL RECEIPTS (Add 11(d), 12, 13, 14, 15, 16 and 17)	186,770.03	498,999.71	18
II. DISBURSEMENTS			
19. OPERATING EXPENDITURES	86,716.29	94,221.81	19
20. TRANSFERS TO AFFILIATED/OTHER PARTY COMMITTEES	125,000.00	193,333.00	20
21. CONTRIBUTIONS TO FEDERAL CANDIDATES AND OTHER POLITICAL COMMITTEES	13,500.00	13,500.00	21
22. INDEPENDENT EXPENDITURES (use Schedule E)			22
23. COORDINATED EXPENDITURES MADE BY PARTY COMMITTEES (2 U.S.C. §441 a(d)) (Use Schedule F)			23
24. LOAN REPAYMENTS MADE			24
25. LOANS MADE			25
26. REFUNDS OF CONTRIBUTIONS TO			
(a) Individuals/Persons Other Than Political Committees NEP	25.00	100.00	26(a)
(b) Political Party Committees			26(b)
(c) Other Political Committees			26(c)
(d) TOTAL CONTRIBUTION REFUNDS (Add 26(a), 26(b) and 26(c))	25.00	100.00	26(d)
27. OTHER DISBURSEMENTS	23,816.76	23,816.76	27
28. TOTAL DISBURSEMENTS (add lines 19, 20, 21, 22, 23, 24, 25, 26(d) and 27)	245,058.05	324,971.57	28
III. NET CONTRIBUTIONS AND NET OPERATING EXPENDITURES			
29. TOTAL CONTRIBUTIONS (other than loans) from Line 11(d)	109,726.90	390,713.17	29
30. TOTAL CONTRIBUTION REFUNDS from Line 26(d)	25.00	100.00	30
31. NET CONTRIBUTIONS (other than loans) (Subtract Line 30 from Line 29)	109,701.90	390,613.17	31
32. TOTAL OPERATING EXPENDITURES from Line 19	86,216.29	94,221.81	32
33. OFFSETS TO OPERATING EXPENDITURES from Line 15	47.15	47.15	33
34. NET OPERATING EXPENDITURES (Subtract Line 33 from Line 32)	86,169.14	94,174.66	34

SCHEDULE B **ITEMIZED DISBURSEMENTS**

Use a separate schedule(s) for each category of the Detailed Summary Page

PAGE 1 OF 1

FOR LINE NUMBER 19

Any information copied from such Reports and Statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee.

NAME OF COMMITTEE (In Full)

Colorado Republican Federal Campaign Committee

	Purpose of Disbursement	Date (month, day, year)	Amount of Each Disbursement This Period
A. Full Name, Mailing Address and ZIP Code Colorado Media Group 5670 S Syracuse Circle Englewood, CO 80111	Voter information to Colorado Voters - Advertising Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	4-24-86 5-1-86 5-21-86	15,000.00 15,000.00 10,000.00
B. Full Name, Mailing Address and ZIP Code Odell, Roper & Associates 165 S. Union Blvd #250 Denver, CO 80228	Purpose of Disbursement Voter information mailing to Colorado Voters Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	4-9-86 4-21-86 5-28-86	14,250.00 20,700.00 7,769.34
C. Full Name, Mailing Address and ZIP Code Arthur Andersen & Co 717 - 17th Street #1900 Denver, Co 80202	Purpose of Disbursement 1985 Audit Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 11-10-86	Amount of Each Disbursement This Period 1500.00
D. Full Name, Mailing Address and ZIP Code Quasar Computer Service 1909 N Academy Blvd Colorado Springs, Co 80909	Purpose of Disbursement Bookkeeping Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 4-10-86	Amount of Each Disbursement This Period 33.03
E. Full Name, Mailing Address and ZIP Code Michael Meyers 415 W. Foothill Suite 118 Claremont Ca 91711	Purpose of Disbursement Consulting Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 4-10-86	Amount of Each Disbursement This Period 2500.00
F. Full Name, Mailing Address and ZIP Code Central Bank of Denver P.O. Box 5548 Denver, CO 80217	Purpose of Disbursement Service Charges Print Checks/Deposit Slips Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 4-1-86 5-1-86 5-27-86	Amount of Each Disbursement This Period 20.39 3.23 9.08
G. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year)	Amount of Each Disbursement This Period
H. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year)	Amount of Each Disbursement This Period
I. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year)	Amount of Each Disbursement This Period

SUBTOTAL of Disbursements This Page (optional)	
TOTAL This Period (last page this line number only)	86,716.29

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 23, 1988

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal
Campaign Committee and
Vincent Zarlengo, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probably cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434 (b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within 10 days. I will then recommend that the Commission approve the agreement. Please make your check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

January 17, 1989

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal
Campaign Committee and
Douglas L. Jones, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d). Additionally, on September 12, 1988, the Commission denied your Motion for Reconsideration of Probable Cause.

On September 29, 1988, based upon the fact that your clients had changed its treasurer prior to the Commission's probable cause determination, the Office of the General Counsel provided you with a supplemental brief regarding the General Counsel's intention to recommend to the Commission that there is probable cause to believe the current treasurer violated the above-noted sections of the Act.

On January 10, 1989, the Commission found that there is probable cause to believe Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Commit-

tee, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

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If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION,
Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

DEPOSITION OF HOWARD H. CALLAWAY

Washington, D.C.
Tuesday, May 5, 1990

* * * *

[3] PROCEEDINGS

Whereupon,

HOWARD H. CALLAWAY

was called as a witness and, having first been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KELLNER:

Q To start off, we are here in connection with the litigation entitled Federal Election Commission versus the Colorado Republican Federal Campaign Committee and Douglas L. Jones as treasurer.

My name is Kenneth Kellner and with me, representing the Commission, is Rob Bonham. The witness is appearing in our office in Washington rather than in Grand Junction, Colorado pursuant to an agreement between counsel of both sides.

Opposing counsel and I agreed all stipulations will be reserved except as to form and the witness may review the transcript for errors and sign it before any notary public.

What is your address?

A 3131 East Alameda, Apartment 2103, Denver, [4] Colorado 80209.

Q What is your business address?

A First of all, the Crested Butte Mountain Resort, P.O. Box A, Mount Crested Butte, Colorado, or I have an office in Denver which is at 1900 Grant Street, Apartment 850, Denver, 80203.

Q How long have you lived at that address?

A Since 1980.

Q Have you ever been deposed before?

A Yes.

Q What were the circumstances surrounding those depositions?

A They were business circumstances. One, as I recall—I forget the deposition, I just talked to the attorneys—but one, as I recall, is in connection with an antitrust suit of a business that I am involved with. I am not certain of any depositions as Secretary of the Army. I had a number of legal matters and some may have involved deposition and I had meetings with attorneys about that.

Q Even though you have gone through this sometime before, I am going to go over some instructions with you. [5] Basically I will be asking you a series of questions. If at any time you don't understand the question, let me know and I can rephrase or repeat the question. If you don't indicate that you don't understand the question and you answer it, it will be assumed that you answered the questions to the best of your knowledge.

The court reporter will take down everything that you say and will prepare a transcript of this deposition and it is very important that you answer every question in

words because the reporter cannot record nods or any signs that are not spoken. Do you understand?

A Yes.

Q You have the right to have counsel with you at this deposition? Do you have counsel with you today?

A Yes.

Q Can you identify counsel?

A Tom Kirby and Carol Laham.

Q Is counsel representing your personally?

A Yes.

MR. KELLNER: Mr. Kirby, does your firm represent any of the parties in this matter?

MR. KIRBY: We represent all of the Defendants [6] in this matter.

BY MR. KELLNER:

Q Mr. Callaway, what, if anything, did you do in preparation for this deposition?

A I talked to my counsel about—

MR. KIRBY: Don't tell him what you talked to me about.

THE WITNESS: —about three weeks ago, my recollection is about three weeks ago, for maybe 30 or 40 minutes and I talked with him yesterday for an hour.

BY MR. KELLNER:

Q Were the discussions meant to be confidential?

A Oh, yes.

Q Did you discuss this matter with anyone other than counsel?

A Not substantively. I have discussed it with some of my associates at GOPAC where I work. I discussed it at some length with members of the Republican National Committee that I met with within the last six months as a minor part of what I was talking about. I generally go to national committee meetings to give a talk on GOPAC and meet former colleagues of mine

and I talked to them about [7] it, sort of a "what-is-happening" kind of thing, nothing substantive.

Q What was the nature of your discussions with—

MR. KIRBY: Before you answer that quesion, let me make a general observation and objection.

Mr. Callaway is testifying as a former head of a political party. He is being asked about political activities by a governmental agency. That is a serious intrusion of the First Amendment, and at the last hearing we had, the magistrate admonished Mr. Snyder, who is no longer here, that he seemed insensitive to the First Amendment overtones of this proceeding.

I hope what you will do is focus your questions very narrowly, very tightly, on exactly what you told the court is relevant to this proceeding because if you try to launch some fishing expedition of a general inquiry into Mr. Callaway's political activity, we will not do that. All right?

You may answer the question.

THE WITNESS: Repeat it, please.

MR. KELLNER: Read back the question, please.

(The reporter read the record as requested.)

[8] THE WITNESS: The nature broadly was most of the discussion was what is a political party allowed to do under the law as it is currently interpreted, what is a political party allowed to do to fulfill its fundamental purpose of holding the other party responsible without being stopped by the law. Members of both parties that I have been connected with feel strongly that the parties are the best people to make democracy work.

We would not be involved in the parties if we didn't believe that and are very, very concerned about anything that has an effect which, as it certainly did when I was chairman, of stopping parties from doing what we think is their responsibility to their constituents, the responsibility to their donors and responsibility to the public and clearly their right under the law in our opinion.

BY MR. KELLNER:

Q Why did you hold these discussions?

A I would not have been chairman of the party if it was not important to me. It is enormously important to me that parties be active and be allowed to do what they are designed to do and I take it very seriously when I am [9] stopped from doing that.

Q Did you bring any documents with you today?

A No. I brought some but nothing that bears on this case with the exception of your address. That is the only thing.

Q Did you review any documents in preparation for the deposition?

A No.

Q Where are you presently employed?

A I own the Crested Butte Mountain Resort and while I am not on the payroll per se as a shareholder, I would say that is employment and that is the address I gave you, P.O. Box A, Mount Crested Butte, Colorado.

Q Earlier you mentioned GOPAC. What is GOPAC?

A That is a nonfederal PAC that has the purpose of electing Republicans to Congress and hopefully controlling the Congress by the Republican Party by recruiting people who run primarily for the state and state legislature, recruiting and training and preparing, so that when the time is right to run for Congress, they will be prepared to do so. Once they run for Congress we have nothing further to do with them and we do not contribute to the [10] federal campaign in any way but contribute to state and local campaigns generally in all 50 states.

Q Was GOPAC your first involvement with politics?

A No.

Q Can you summarize some of your political involvement over the last 20 years or so?

A Twenty years, I will start with elected office.

In 1962 I was very involved in the Draft Goldwater movement. I was a deelgate to the Republican National Committee convention in 1964 in San Francisco. I ran

for Congress in 1964 and was elected in that year and served in the 89th Congress.

In 1966 I ran for governor as a Republican nominee of Georgia, and in 1980 I ran for the U.S. Senate as a Republican in Colorado. I ran in the primary but did not win the primary. And in 1981 I became chairman of the Colorado Republican Party until 1986 with three terms, or six years.

Q Since then?

A My political activity, other than personal contributions I may have given or personal conversations that I have with a great many people that I know and [11] respect, has been with GOPAC. I became chairman of GOPAC about February 1987.

Q. I would like to focus on your activity with—activity in 1981 to 1986.

A If I said '86 it went to '87. It was '81 to '87. Three consecutive two-year terms.

Q Is that a full-time position?

A No.

Q Were you employed outside of the party?

A I was owner the Crested Butte Mountain Resort and part of the time as president on the payroll and part of the time as owner, but as the owner I consider that employment because distributions made to the owner is my source of employment. Not being technically on the payroll is a technicality. As far as I was concerned I was employed by Crested Butte Mountain Resort at that time.

MR. KIRBY: He is not and has not been a vagrant.

BY MR. KELLNER:

Q Were you involved with the party prior to becoming chairman?

[12] A As a candidate for office I obviously worked with the campaign work very closely. I was not involved in any precinct chairman or district chairman of anything of that kind.

Q How did you come to become chairman?

A Having run a campaign throughout the state I became well known. I worked through the state convention for the nominating process. Obviously, I worked with active Republicans and was able to make enough friends that when I wanted to continue my political activity and announced, I was elected without opposition.

Q What were your duties and responsibilities as chairman?

A Very broad. The bylaws of the Colorado Republican party then, and as far as I know now, pretty much give control of the party to the chairman. There is an executive committee.

The chairman gets to appoint—as I recall, eight members of the executive committee and a number of others are ex officio, but the executive committee has never, in my time that I was there, has never on a broad policy matter overruled the chairman, so for practical [13] purposes the chairman ran the party.

Obviously the chairman is responsible to the central committee which is the official body of the Colorado party. The central committee never gave day-to-day instructions. The central committee was more concerned with things like nominating candidates, and that sort of thing.

Q How many were there in the central committee?

MR. KIRBY: At what time?

THE WITNESS. At the time I was there I will pick a number that is fairly close and say 350 to 400.

BY MR. KELLNER:

Q And at the time you were there, and I would like to focus the questions on that time, how many were there on the executive committee?

A About 20.

Q Can you tell me in more detail what your duties and responsibilities were as chairman?

A They included the whole gamut of things that parties do. They include responsibilities for fundraising. Although I had a finance committee that I appointed, the finance director was a person that I hired, [14] the financing staff was a staff that I hired.

The direct mail was done under my supervision, direct mail fundraising, and the fundraising was primarily from direct mail and from three principal groups; the 250 Club, which is $250 a year, and the Elephant Club, which is $1000 a year, and the Chairman Circle, which is $5,000 a year. The Chairman Circle started while I was there.

A large part of the time is involved with major donors and talking with them and working with them and the lesser part of the time is supervising things like direct mail. Obviously without financing you have nothing, so that was sort of a prime responsibility.

Next responsibility was coordination with the National Committees. I frequently coordinated with the Republican National Committee and the National Republican Congressional Committee, the National Senatorial Campaign Committee, trying to work ways to be more effective in joint cooperation.

We were remarkably successful in working very closely with the three committees which is not the norm in the state party. The operation of the staff was my responsibility, a relatively small staff, and the hiring [15] and firing of the staff, delegating duties to that staff was my responsibility. Recruiting candidates, seeing candidates are well financed, training, and we did something most parties have not done before or since and maintaind a very efficient computer program list, maintaining lists so any candidate at any level, preprimary or postprimary, we would give lists to so they can use that in the neighborhood or direct mail and that was available in a very quick turnaround time in ways that were specifically desgined to

hit Democratic areas by zip codes or whatever, and I probably left out some things, but it is fair to say the operation of the entire Repubican Party at the state level, including coordination with the various county chairman and county committees, I mean very broad powers to the chairman in the state of Colorado.

Q This would include coordination with campaign committees?

A Yes. To the extent they were willing to be coordinated. Naturally some are coordinated better than others. The party never took a position in primary. My position was we would help both equally. The position [16] before I got there was we would help neither. But we did not take positions between parties in primaries. After the primary it was our job to give full support to the nominee.

Q Was there any individual with greater authority than you when you were chairman?

A No. Not in party matters. You may consider Bill Armstrong as titular head of the party but that is because he is a GOP Senator. In the Republican Party, no. No one else had real power except Advisory through the executive committee.

Q What is your association with the state party currently?

A I am a donor to the state party. I probably called Bruce Benson, the man who took my place, once every three or four months, and I would say I am very inactive. The worst thing a former chairman can do is to pretend he is still chairman.

Q What is the Colorado Republican Federal Campaign Committee?

A That is the campaign committee that we very carefully saw to it in the vernacular had corporate clean [17] money, not that they were not both clean but it was accepted under the limits of the Federal Campaign Law. Colorado is corporate state so the Colorado party could accept corporate checks but the federal campaign funds could not.

This was a campaign committee that we scrupulously kept for moneys that could be used for federal campaigns and whenever we wanted to use money for a federal campaign we would use that money. In other words, money can flow one way but not the other.

We could use federal money for a state race but not—we can use, we could use federal money to apply to a state race if we so chose but we could not use state money to apply to a federal race, because it has not cleared all the hurdles of raising for federal campaigns. There may have been corporate money there, there may have been tainted money that could not have been used, so it was kept separate.

Q Who controlled the operations of that federal committee?

A I did.

Q Did your role in the federal committee differ [18] from your role as state party chairman?

A I don't think in any way it differed. There were two different ways to separate the money but my role was the same and both was to help Republicans and hold Democrats accountable.

Q Did the state party or the federal committee have different goals?

A No, no different goals. They are the same. As I said, if our goal translated to a Congressional race, the funds would come out of a federal committee. If there was a goal for a governor race, the funds most likely, but not necessarily, would come out of the state campaign funds.

Q What would these goals be?

A The goals of the Republican Party I think are pretty clear throughout the country. It is to recruit candidates and assist candidates to become elected and elect candidates and to hold the Democratic Party and its leaders accountable. That is the fundamental thing the party does and you have to raise money to do that and other things come along but that is what you are doing.

Q What was your involvement in planning campaign [19] strategy?

A Quite detailed. I had run for office myself and I was involved in it.

Q What things would you do?

A If you say campaign strategy as it affects a particular race, that would be coordinated with the candidate. As far as campaign strategy for the legislature, which was a major part of what we did, we would try to have a pretty coordinated campaign for the entire legislature, the state house, state senate, to include such things as incumbency programs, how could we keep a candidate strong?

But when you get to the individual campaign we would assist with their design, assist with strategy, assist with telling how to fundraise. We tried to be as helpful as we could. In the smaller races. Almost always the campaign manager is a volunteer and many times has never done it before, and it is obviously invaluable.

As you get to the bigger races, the congressional and Senate and governors, they generally have fairly professional campaign managers and we become more of an advisor.

[20] Q I would like to focus on 1986. What was your involvement in campaign strategy that year?

A The same as every year. As much as I had time to give to it.

Q What specific things were you involved with that year?

A The same things I just went over. The state legislative level and Congressional level and statewide level. Governors races. Secretary of State races. The same things I went over with you.

Q Was there a Senate race that year?

A Sure was.

Q What was your involvement in planning campaign strategy for that race?

A I was as involved as I could be in that. There was a contest on our side between three people and I

made all of the assets of the party that I could available to all three of them until the convention in which case we merged with the number one candidate and I made them all available to that one candidate. That was Ken Kramer. And I also attempted to hold the Democratic Party responsible in all races including that Senate race.

[21] Q How did you do that?

A Early in '86 before there was any caucuses or before there was any—the way the Colorado elections work, if you are running as a party member, and virtually you cannot run as an independent, if you run as a Democrat or Republican, you first go to the caucus that takes place in the first couple weeks of April, as I recall.

Those caucuses are open to everybody. The Republican caucus is open to all Republicans and the Democrat Caucus is open to all Democrats, and unaffiliates can change registration at the caucus time to go to them so you would say essentially it is open to Republicans and unaffiliates, Democrats and unaffiliated as far as they are concerned—they take place around the first couple weeks in April.

At those caucuses you elect to represent you from among those at the caucus—they don't have to be from among the caucus, people to go to the county convention, people to go the district assemblies.

Usually from the county you elect people from the county and in the statewide race, like the Senate you mentioned, the step would be you go from the caucuses to [22] the county convention to the state convention. At the state convention those who want to run for the U.S. Senate appear to be nominated and the names are put in nomination and voted upon by the entire state convention.

You had to get 20 percent of the people at the convention to go on the ballot. If you went on the ballot, and there were two of you, this meant you entered the primary. At the time we started looking at this, realizing the Senate election was being an open seat, it was enormously important to both parties—that is the time you go

even stronger with a Challenger or incumbent—and we were looking at that and sometime early in that year Tim Wirth began to have press releases. And I don't know if he had a formal announcement, but it was clear he was going to run for the Senate and it was clear he was starting to pitch his version of his record in the Congress.

He did this in several areas. He did it in defense, he did it in the phone company breakup, and in my view what he was saying was so incredibly apart from the facts that I would have truly been derelict to let him get away with it. Here is a leader of the Democratic party as [23] a Congressman—there were only two Democrats, as I recall, at that time. They had a governor but he was certainly in the top four or five leaders and aspiring to lead higher because he had announced or made clear he had a campaign organization building and coming out with statements that were just so far from the record that it was unbelievable. There was nobody to refute that. We had no candidate.

At that moment no candidate on the Democratic side had come out. I didn't know if one would come out or not, but clearly at that time he was getting away with saying things that were not being refuted by anyone and we had no candidate to refute it, and the only possible person to refute that was the party, the only one that I know of and I held press conference and we placed ads, radio and mail, and we said here are the facts, and the facts are not what Tim said the facts were, and here is a man who, like most congressmen, is running for election, the time is a two-year term and he is always running for election and he is unopposed by anybody and I thought if the party does not do something, he will have had many months until either a Democratic opponent emerges or a [24] Republican gets through the primary phase and at which time people would have heard his story unopposed for so long, whether he runs for Congress or governor or Senate, or whatever he runs for, he is out there being unopposed and he needs to be opposed.

Q Why?

A I believe in the two-party system. I happen to believe that what makes America great politically is an adversarial system. You don't say to someone just because an incumbent they can get away with whatever they want without being opposed. What is a party for? That is what the party is for, to hold the other side accountable, to keep them from making what I thought were outrageous statements, outrageously inaccurate, and if I am not allowed—what is the party for? We talked about many other things the party is for but that is a large part of what a party is for.

Q You mentioned that you put out ads. Can you tell me more about them?

A The ads were primarily direct mail in which case it was fairly new to Colorado. Instead of just a letter it was a bright almost like a poster kind of ad or maybe a [25] large 8½ by 11 folder that opened up in bright red or blue with a theme on the cover, or on radio or on television, but as I recall it was just direct mail and the radio, and the theme of all of them was you can't play with the facts the way that he was doing. Here is the record. We point out that record. We pointed out in great specificness with we were specific about individual votes that did not tally with what the campaign rhetoric was coming on the other side.

Q So what did you do? You put out your own ads?

A Yes.

Q Can you tell us more about those?

A I said they were direct mail with the particular colored kind of bold direct mail and they were radio ads and all of the theme of "you got to tell the truth, Tim Wirth, and tell the truth how you voted. You cannot say you are for strong defense when you voted against defense. The record shows that you broke up the telephone company."

Q If I showed you a script of one such ad would you recognize it?

A Probably.

[26] MR. KIRBY: It probably depends on what it is a script of.

THE WITNESS: It has been a good while ago but I think I would.

MR. KELLNER: Mark this as Exhibit 1.

(Callaway Exhibit 1 identified.)

MR. KIRBY: For the record, this is the ad we have referred to as Exhibit 1 and there is no dispute that the Defendant party sponsored that ad.

BY MR. KELLNER:

Q Do you recognize the script?

A As far as I can tell it appears to be the ad that we placed, yes.

Q This is a script used in a radio ad?

A Yes.

Q Who wrote the script?

A I don't know who wrote the script. I know I approved it.

Q Did anyone else approve it?

A No one could have approved it in the sense of approving it. Whether, you know—I really don't know who wrote it. We talked about it around the office. I [27] don't know.

Q Who else reviewed the script prior to its airing?

A I am not sure. It is possible that the executive director or the political director of the party would read the script.

Q What were their names?

A Executive director was Kay Riddle; the political director was Doug Goodyear.

Q Are they still associated with the party?

A Doug Goodyear is not. Mrs. Riddle is the national committeewoman from Colorado which is not—some people would say it is technically an officer of the party and others would say it is an officer of the Republican National Committee, but I would say it is associated with the party for the purpose you are asking.

Q How was this ad designed?
A What do you mean?
Q How did the decision to put out this ad come about?
A I had served as secretary of the Army when Tim Wirth came to Congress. Even though I didn't live in [28] Colorado in those days I was familiar with Colorado politics and that is what happened, and Tim Wirth was so obviously, to those of us in the Pentagon or the Defense Department, a person who had agenda for often called liberal agenda for reducing defense, it was obvious, and that is the way he treated him, and I don't recall when I first heard him, but he came out sometime around the first of that year, first of '86, with a statement saying what America needs is a strong defense and the willingness to pay for it. And I was flabbergasted.

Here was a guy that had been fighting this every day of his life. He fought me as Secretary of the Army and fought the Secretary of the Army after us and voted virtually against every key vote that was important. Any of the key amendment for the Army, Navy, Air Force and Marines, voted against them time after time and I thought that was outrageous. I said who is going to call this to the people's attention, and there was no one else so I had held press conferences and took these ads and I don't know what else you would do.

Q Why would you want to call it to people's attention?

[29] MR. KIRBY: I will allow him to answer these questions because he seems to be doing it just fine, but that kind of questioning of a leader of the political party in this kind of proceeding indicates why these types of depositions should not be held. I am asking you to focus on the facts you need and not pursue lectures in civics.

BY MR. KELLNER:

Q Do you recall the question?
A Why did I want to have the ads?

Q I am not sure if I remember it myself.

MR. KELLNER: Would you read back the question?

(The reporter read the record as requested.)

THE WITNESS: Why would I want to call what I saw as a great discrepancy to the people's attention? Mr. Kirby said something about a civics lesson but the purpose of the Republican Party is to hold the other party accountable. When the other party makes an outrageous statement the other party has an obligation—I would have been derelict in my obligation.

Here is a man saying things that are not true. Whether I am right or wrong, I believe that, and if I [30] believe that as chairman of the party and here is a leader of the other party, I've got an obligation. Why wouldn't I want to do it? That is my job that I was elected for.

BY MR. KELLNER:

Q What were you trying to accomplish by doing this?

A I was trying to set the record straight, and whether Tim Wirth ran for Congress or ran for governor or ran for Senate or just stayed as a leader in the party, I wanted to say nobody in the Democratic Party can make such outrageous statements as he was making and get away with it unchallenged, and while the likelihood was that he would run for Senate, and there was talk of Dick Lamb, the current governor, would run, he would have wiped out Tim Wirth.

Pat Schroeder was giving hints she wanted to run. In my opinion Tim Wirth probably would have won it but certainly it would have been a close race. I was just saying here is a leader of the opposition party making statements I think are outrageous and I have an obligation to correct them.

Q Why?

[31] A Ken—

MR. KIRBY: If you feel you answered that question—

THE WITNESS: I feel I have.

MR. KILLNER: We will take a short break.

(Recess.)

MR. KELLNER: Back on the record.

BY MR. KELLNER:

Q I want to discuss in more detail the production of the ad script which is in front of you. Did someone get paid to prepare this ad?

A I don't know. I don't recall anyone being paid.

Q Whose voice was used to read the script over the radio?

A I don't know. As far as I know, the announcer would have been paid but—I assumed it was a paid announcer but I don't know that.

Q Who was involved in its production?

A I am not even sure of that. We use an ad company called Walt Klein Associates from time to time. I am not sure. Someone had to place the bylines and—I am [32] not even sure who it was.

Q Did you authorize contacting that company?

A Yes. If it was Walt Klein, I clearly authorized it but I don't recall if it was Walt Klein or someone else. The production and placing of the ad, I did not place importance on that. We would have done something much more sophisticated than that and it was not the kind of thing you would pay much attention to.

Q What kind of documentation was involved in approving the script and placing the ad?

A "Improving" the script? "Approving" the script?

MR. KIRBY: If you recall.

THE WITNESS: I don't recall any. Normally the way we would work I might have initialed the bottom but I don't know. I probably would have initialed the bottom.

BY MR. KELLNER:

Q Who would present it to you for your initials?

MR. KIRBY: If you can recall.

THE WITNESS: I don't recall but it would be one of the staff persons.

[33] BY MR. KELLNER:

Q I don't want you to answer any questions that you can't recall the answers to but who were some of the staff people that would bring these matters to your attention?

A This being a political matter as opposed to a finance matter, or something of that kind, most likely would be the two I already mentioned, the political director or the executive director.

Q You mentioned Doug Goodyear?

A Yes.

Q Where is he working now?

A To the best of my knowledge—I know he is living in Denver. To the best of my knowledge he is a political consultant who is doing consulting with the Hank Brown for Senate campaign in Colorado, for the baseball stadium in Colorado that a referendum is probably to be held in November on whether the Colorado—Denver builds a major league stadium or not and for a Wayne Alard for Congress Committee. That is all I know about that. I think he is doing those three campaigns and maybe others, but most likely others.

[34] Q Do you know his address?

A No.

Q Were there any meetings held at which this ad was discussed?

A There had to be. I would say there were not, to my knowledge, any meeting in which this ad was discussed as much as there were meetings in which it was discussed that Tim Wirth was making statements that were not true. We went into some effort to document

the things Tim Wirth said in ways that I felt he was not at least telling the whole truth or not telling the truth.

I felt that what I felt was truth should be brought to the people of Colorado. I don't recall—again, the ad was a fairly simple kind of thing. Once you decide here is what Tim Wirth is saying and here is how we have to hold him accountable, the means we have at our disposal, because we could not afford TV, that was more of a decision being made. I don't recall a lot of time being spent on this particular ad.

Q Who attended the meetings at which Wirth was discussed?

A I would say the meetings were frequently [35] one-on-one with Kay Riddle, one-on-one with Doug Goodyear or perhaps the three of us, the vice chairman of the party, a volunteer as I was a volunteer, the other two were paid. Mindy Nicklejohn might have been there. The secretary of the party could have been there for some of them.

Our finance people could have been there from time to time. And the general thrust would have been discussed in any executive committee meeting that occurred at that time. I can't recall if one occurred at that time but it would have been discussed.

The thrust of what we were doing was fairly widely discussed with a number of people. This specific ad was probably not discussed with anybody. Somebody may have handed it to me and I initialed. I don't remember anything about this particular ad except it fit the thrust of what we were doing.

Q At the meetings you mentioned where Wirth was discussed did you take any notes of those meetings?

A I don't think so. If I did, I don't have them now. It was not my habit to take notes.

Q Was there a secretary taking notes?

[36] A No. We didn't work that way.

Q What system do you use for recalling information or readings?

A You hope you have a reasonably good memory.

Q Was Wirth ever discussed at executive committee meetings?

A I don't recall, but he certainly was. We discussed every candidate at every meeting.

Q Were minutes kept of these meetings?

A Yes.

Q Did you save copies of the minutes?

A No.

Q Where would those documents be?

MR. KIRBY: If you know.

THE WITNESS: I don't know. I did not take them from the party when I left.

BY MR. KELLNER:

Q Now, while you were chairman where were the documents kept?

A In file drawers in the Republican Party.

Q They were there when you left?

A As far as I know. Generally, it is the [37] responsibility of the secretary of the party to keep the minutes and that was generally done. They were not kept in the kind of detail—I would be surprised—the kind of detail that would be normal, "Chairman Callaway discussed the six campaigns going on in the state. Next paragraph."

Q You mentioned you didn't take the documents when you left the state party. What documents did you take?

MR. KIRBY: That is a "when did you stop beating your wife" type of question. If you took any documents you may describe them, Mr. Callaway, if you can recall at this late date?

THE WITNESS: This was a volunteer job of mine and this means it was not full-time for the party. And I had no other offices in Denver except this office for parts of that time at least. The documents that I would have taken, or the only ones I recall taking, were those having to do with personal mail or businesses that I am involved with other than the Republican Party.

I don't have—recall taking any documents having to do with the Republican Party. When I left the office of Secretary of the Army, I felt those were [38] institutional property and not my property.

BY MR. KELLNER:

Q When did you find out that Tim Wirth was a candidate for the Senate?

A I guess people had been talking about it, press speculation, and talked about it forever since '74 when he first ran for Congress. People who were close to Tim Wirth said Tim Wirth was going to run for the Senate the first available opportunity and that he would run for president at the first opportunity and he was known by all of us to be a very ambitious person.

None of us thought he would stay in Congress, the rest of his life and there was an open seat coming up and it made it more likely, and I would say the race in '86—around '85 people started talking about that. Sometime around the first of the year, as I recall, he got a campaign committee and began starting doing things.

I don't recall when he physically announced. That was later in March but I don't know—I am not sure whether we did these things before or after he was an announced candidate. But it was a recognized fact by most people that Tim Wirth was going to run for the Senate. If [39] you asked the political reporters, they would say he would run for the Senate. I though he would run for the Senate. For several years before this I thought he would run—

Q As chairman of the state party when did you know your first reaction to Wirth's candidacy or potential candidacy?

A The first time I reacted in a public way was in response to a statement he made, or a press release he made, or perhaps an announcement, but he made very specific statements and I think in advertising, but I am not certain of this, in which he said things like what this

country needs is a strong defense and a willingness to pay for it in which he said specifically he had nothing to do with the telephone company breakup and he said things that I thought were patently untrue. Everything that I did was a specific reaction to that.

Q Did you have an attorney review this script before it was put on the air?

A I would be very surprised if we did. I am fairly certain we did not. We have an attorney for the party, but I doubt it.

[40] Q Was that the practice?

A I don't think so. We used an attorney more to help—

MR. KIRBY: Excuse me. Let's not talk about your practices in obtaining legal advice. I don't believe that is something that the Commission want to know about.

BY MR. KELLNER:

Q Was it your practice to seek legal review of statements or advertisements?

A I don't recall a time that we did.

Q How was this ad financed?

A It was paid for from the Federal Campaign Committee, the funds for which were collected through our finance department both from direct mail and from other direct givers. My recollection is that the vast majority if not really all of it, was from direct mail.

Very carefully we allowed no corporate funds—we carefully did not get into any federal limits. We assumed —in that federal campaign subcommittee we assumed that money must pass all the regular standards of federal campaign financing and we attempted to do that [41] and, as far as I know, we did that precisely.

Q Why was that important?

A I guess out of an abundance of caution whenever we felt anything might be in a federal campaign, involved in anything affecting the federal campaign we would do it. I suppose we could have done it out of the state

campaign committee. We did things out of the Federal Campaign Committee from time to time. Actually we had more money in the federal campaign than the state campaign. We had a U.S. congressman in a federal office. It was a double campaign.

If it had been the state legislature we probably would have used the state campaign committee.

MR. KELLNER: Off the record.

(Discussion off the record.)

BY MR. KELLNER:

Q I would like to follow up on things you mentioned earlier. You mentioned in addition to authorizing ads to react to statements by Tim Wirth you also held press conference or released statements. Can you tell us more about those?

A My recollection is I had over two or three press [42] conferences over a period of six or eight weeks when the candidate was not known for either the Democratic or Republican nomination for the U.S. Senate. And as I recall, I had one on defense which I think was in direct answer to an ad that he was running, that is my recollection, in which case I attempted to document in 30 or 40 votes specifically how he had been among the leaders of the antidefense group in the House, and to point out that he is trying to make himself into something that he is not and that is the purpose of that press conference.

I think after that, but I am not certain, but I think after that, by two weeks, there was a press conference in which I talked primarily about the breakup of AT&T because he was saying the breakup of AT&T was caused by the Justice Department and he had nothing to do with it and, after all, the president was President Reagan, and I said in the press conference I know who is president but I know who is chairman of the Oversight Committee who has to do with that, and I have the documents of the Oversight Committee.

And I had the documents. I brought the documents to the press conference as I recall from him as [43] chairman of the Oversight Committee to the Justice Department urging the breakup of the phone company, and I forgot whatever other evidence that I had, but there was a substantial amount of evidence that went to the fact he was in many cases the person most responsible for the breakup of AT&T which I felt he was and it was not responsible to say he had nothing to do with it. So those were the press conferences, either two or three of them.

Q Why did you hold them?

A That is the question of why did I run for chairman of the Republican Party? If I am chairman of the Republican Party I have an obligation to do that.

Q I am not familiar with how press conferences and press releases work. Would you read the statement in public? Can you teil me more about that?

A In Colorado the tradition of political press conferences is they are held in a state capitol in a room of the capitol where legislators and the governor can go and you get the political press to come and you announce and put notices on the board in the capitol and do a few other things and say you will hold a press conference at this time.

[44] My style was generally not to read the press release but to speak, to also take questions, and my recollection is I did not read anything but spoke. I am quite sure that I have documented the best that I could the allegations that I was making where he had distorted the record in my opinion.

Q Would you simultaneously issue a statement?

A Probably.

Q Were these press conferences recorded?

A Almost certainly by radio stations, television. I am not aware that I had any recording of it, or that I ever did.

Q So you don't have a recording of it?

A I am certain I don't.

Q Did you have any kind of prepared speech before you would hold a press conference?

A I would like to think I was very well prepared. I would not go to an important television and radio audience without being prepared, but my style was usually to speak from a note or two, or without notes, and probably to pass out a statement at the end of it. That is what I probably did.

[45] Q Who would write the press release?

A Essentially, I would. As far as I know, I wrote them all.

Q Would you have anybody review it?

A Probably I would have Doug Goodyear and/or Kay Riddle review it. And if there was any research, we may have had an intern look up the Congressional Record and have him check it that I would get the facts right on it.

Q Is there anyone else you would seek input from?

A I might seek input from the executive committee of the other officers, the vice chairman, the secretary of the party. These were all volunteers and they may be there one day and not be there the next.

There was no normal, formal, in the sense of a staffing done by the Defense Department, of checking off each staff. There is none of that what whatsoever. It was a kind of a thing who might be there that day, and financial contributors, we tried to keep informed. It made sense.

Q Are you familiar with the Federal Election Campaign Act?

A Reasonably. I am not an attorney but as a [46] layperson I consider myself reasonably familiar as a layperson with that Act.

Q Are you familiar with the limits on expenditures by a state party under section 441(a)(d)?

A I don't know about 441(a)(d) but I think I am familiar with what you are talking about.

Q Was it a practice for the state party while you were chairman to assign its expenditure limit under the Act?

A Yes.

Q Did that take place during the entire time you were chairman?

A I think so. There may have been a time when we spent our own limits but I think probably in every case we assigned it.

Q Was it the practice before you were chairman?

A As far as I know. I don't know.

Q Why was it assigned?

A We have such limited funds in the state and are always hunting for more money and if we could get support to our candidate without having to spend our money, that was preferable to us that by assigning—I don't know. [47] If we assigned it to any national committee and they put up the money, then we were better off than if we gave the same money out of our limited funds. We viewed the national funds as less limited than our funds. Maybe they didn't view it that way.

Q You used the term "limited funds." What did you mean?

A I already alluded to the fact one of the principal jobs I had was to raise money. You can almost judge the success of a party or the success of its chairman by how much money they raised. You are constantly, constantly, constantly working to raise money. That goes with the territory.

And no matter how hard you try, you wish you had another $10,000 here and $20,000 there, and there is always in every campaign you wish you had more money to do something with but you are limited by what you can raise. If you don't raise it, you don't have it and that is what I mean by limited, never having the funds to do the things that you want to do.

Q Whether—

A When I say "limited," it is limited by the [48] federal campaign funds. It is limited by law. You are limited to amounts in certain cases and limited to non-corporate so we are not only limited by our skill in raising money but also limited by limits placed by the federal government.

Q Is there anything else you would like to add to answers that you gave here today?

A I don't think so.

Q Have you given full and complete testimony here today?

A I think so. Yes.

MR. KELLNER: Counsel, do you have any questions for the witness?

MR. KIRBY: Yes, I have very few questions.

EXAMINATION

BY MR. KIRBY:

Q Mr. Callaway, the document that we have marked as Callaway Exhibit 1 was aired in April 1986. During the early part of 1986 was the committee engaged in fundraising activities in Colorado?

A Yes.

Q Based on your experience in political affairs [49] would you have expected Wirth Exhibit 1 to have any effect on the success of your fundraising efforts?

A Yes, I think so, but let me put it another way. If you got a political party that is not seen as aggressively doing its job in holding the other party accountable, and when I saw discrepancies in Tim Wirth's statement let me be sure that the large number of activists saw the same things and called me on the phone, and if the party was not responding to that, the fundraising would drop quickly.

You have to do things that people in your party approve of and to that extent it is part of what you do. You do what you have to do you raise money.

Q Based on your experience in politics, is the view that you just expressed unique to you or are there other politicians that would share that view?

A I would be amazed if there is any politician that would not share that view. It is fundamental that you raise money that the people you do things for see it as important.

Q You testified I believe that you were generally cautious that the Federal Election Act imposed a limit on [50] the spending of the party?

A Yes.

Q During the time you were chairman if there had been no federal spending limits were there things that the party would have spent on to support or oppose candidates for federal office?

A Yes. Yes. Yes. Incredibly. The kind of hoops you have to jump through as a party to stay legitimate and do the job, the kind of things you try to do is volunteer intensive and you come out—is it voluntary-intensive if the person carries the bag to the truck, is that volunteer-intensive? No.

It is a burden that is enormous to try to stay within the limit, within the law on the limit placed on federal candidates to the extent that many parties do not do it. They say they don't deal in federal elections because it is so confusing and difficult to comply with the law they just don't do it.

Q I am going to show you a clipping that appears at tab 13 to the Defendants' Statement of Undisputed Facts And Supporting Exhibits that has been submitted to the court, entitled "Dark Horse Challenges Representative [51] Wirth," by Peter Blake.

Does the name "Peter Blake" mean anything to you?

A Yes. He is well known.

Q Who is Mr. Blake?

A He is probably the leading political writer of the Rocky Mountain News that is the largest newspaper in

Colorado. He is well respected and he is not certainly a Republican. I don't know his registration, but he writes for both parties and is respected as being fair by both parties.

Q Is he considered to be honest?

A Yes.

Q If Mr. Blake reported a fact as a fact, would you be inclined to believe that he was telling the truth?

A Yes.

Q All right. I said "Mr. Blake."

A Pete Blake.

Q You commented Mr. Wirth, Congressman Wirth, was an incumbent Congressman in 1986; is that correct?

A That is correct.

Q Based on your experience in the political arena, [52] do incumbents have any advantages in seeking to gain reelection or to gain election to a higher office?

A The advantages are so enormous it is an absolute scandal. The amount of money incumbents get to promote themselves is such that reelection to the House in the last two elections your 98 percent. The reelection to our House—we have less turnover in the House of Lords in Britain, and the Congress, that is supposed to be close to the people, they get enormous amounts of staff which while they cannot get directly involved in a campaign, helps the campaign enormously and they get franked mail, that is a help, but they get postal patron frank mail. Every law is designed by incumbents to help incumbents, a lesser advantage if you go from the House to the Senate, but still a huge advantage.

MR. KIRBY: That is all I have. Thank you very much.

MR. KELLNER: Off the record.

(Recess.)

MR. KELLNER: On the record.

[53] EXAMINATION

BY MR. KELLNER:

Q I would like to ask you another question. Based on your testimony that you just gave, you mentioned some difficulties that you have in staying in compliance with the law. What did you mean?

A A political party is designed to do a lot of things. Among them is to help candidates and help candidates in the way, in their judgment, is the best way to help them. For federal candidates, which come under the FEC, there are rules that to the average nonlawyer state chairman are so complex and so difficult that many people just say I just won't play in that league. Giving examples, this is my recollection and this may not be the exact law, but it is my recollection, we can give all the bumper stickers to a candidate but cannot put a poster up. We can make it volunteer-intensive.

What does voluntary-intensive mean? Nobody knows. It probably means if you start and have it written by volunteers and printed by volunteers on their own press, that is probably good, but if you do less, where? There is no clear line.

[54] Every time you mail any piece of mail that is voluntary-intensive that a party can do under the laws, when I was there you always run the risk of being harassed, of having the opponent complain you violated the law, and defending yourself, and the whole gamut, what have you, is subject to federal laws that are seen to be extremely complex.

We, the Colorado party, put out a kind of thing on interpreting federal law because a lot of parties for other states were not as well organized as we were or did not pay as much attention or tend to forget whatever it was, but it is what you can do and can't do from a layman's standpoint instead of the legal viewpoint.

Because the committee gave you the legal viewpoint, a lot of people said that is all right for you but not for me. I will not play ball in federal races. A lot of states don't see the federal races as that important anyway.

Many states, Indiana being a prime state, would far rather elect a Secretary of State or Commissioner than a Congressman and they would say, "Look, it is tough enough anyway, we don't play in the federal game." That [55] is a shame. Parties should play in the federal game. Parties are designed to help those that should play in the game and the rules make it so complex it is very difficult.

Q Okay. I will ask you if there is anything you would like to add to the answers that you gave already?

A I don't think so.

MR. KELLNER: Okay. Then.

MR. KIRBY: Thank you very much.

MR. KELLNER: The deposition is concluded.

(Whereupon, at 3:05 p.m., the deposition was concluded.)

/s/ Howard H. Callaway
HOWARD H. CALLAWAY

[Certificate of Notary Public and Reporter Omitted in Printing]

STATUTORY PROVISIONS

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) Dollar limits on expenditures by candidates for office of President of the United States

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000, in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) Increases on limits based on increases in price index

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(e) Certification and publication of estimated voting age population

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) Prohibited contributions and expenditures

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) Attribution of multi-State expenditures to candidate's expenditure limitation in each State

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Senatorial candidates

Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

(Pub. L. 92-225, title III, § 315, formerly § 320, as added Pub. L. 94-283, title I, § 112(2), May 11, 1976, 90 Stat. 486; renumbered Pub. L. 96-187, title I, § 105(5), Jan. 8, 1980, 93 Stat. 1354; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

§ 437f. Advisory opinions

(a) Requests by persons, candidates, or authorized committees; subject matter; time for response

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) Procedures applicable to initial proposal of rules or regulations, and advisory opinions

Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) Persons entitled to rely upon opinions; scope of protection for good faith reliance

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) Requests made public; submission of written comments by interested public

The Commission shall make public any request made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commis-

sion shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

(Pub. L. 92-225, title III, § 308, formerly § 313, as added Pub. L. 93-443, title II, § 208(a), Oct. 15, 1974, 88 Stat. 1283; renumbered § 312 and amended Pub. L. 94-283, title I, §§ 105, 108(a), May 11, 1976, 90 Stat. 481, 482; renumbered § 308 and amended Pub. L. 96-187, title I, §§ 105(4), 107(a), Jan. 8, 1980, 93 Stat. 1354, 1357; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

SUBCHAPTER I—DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 455 of this title.

§ 431. Definitions

When used in this Act:

(1) The term "election" means—

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual

shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

* * * *

§ 434. Reporting requirements

* * * *

(b) Contents of reports

Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated commitees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of title 26;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year, together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a (d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 441a(b) of this title;

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by

the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6)(A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such inde-

pendent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 441a(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year; and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

* * * *

§ 437c. Federal Election Commission

* * * *

(c) Voting requirements; delegation of authorities

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.

* * * *

§ 438. Administrative provisions

* * * *

(d) Rules, regulations, or forms; issuance, procedures applicable, etc.

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted to the Senate, any calendar day on which the Senate is in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5)(A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regulation, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a committee of the House of Representatives reports any resolution relating to any such form, rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.

* * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential

electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 791(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segre-

gated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incured thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(Pub. L. 92-225, title III, § 316, formerly § 321, as added Pub. L. 94-283, title I, § 112(2), May 11, 1976, 90 Stat. 490; renumbered and amended Pub. L. 96-187, title I, §§ 105(5), 112(d), Jan. 8, 1980, 93 Stat. 1354, 1366.)

REGULATORY PROVISIONS

11 C.F.R. CH. 1
(1995)

§ 110.7 Party committee expenditure limitations (2 U.S.C. 441a(d)).

(a)(1) The national committee of a political party may make expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The expenditures shall not exceed an amount equal to 2 cents multiplied by the voting age population of the United States.

(3) Any expenditure under this paragraph (a) shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under § 110.1 or § 110.2.

(4) The national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees.

(5) The national committee of a political party may not make independent expenditures (see part 109) in connection with the general election campaign of a candidate for President of the United States.

(6) Any expenditures made by the national, state and subordinate committees of a political party pursuant to 11 CFR 110.7(a) on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b)(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The expenditures shall not exceed—

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State; or

(B) Twenty thousand dollars; and

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) Any expenditure under paragraph (b) shall be in addition to any contribution by a committee to the candidate permissible under § 110.1 or § 110.2.

(4) The party committees identified in (b)(1) shall not make independent expenditures in connection with the general election campaign of candidates for Federal office.

(c) For limitation purposes, State committee includes subordinate State committees. State committees and subordinate State committees combined shall not exceed the limits in paragraph (b)(2) of this section. To ensure compliance with the limitations, the State committee shall administer the limitation in one of the following ways:

(1) The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission which permits control over expenditures.

(2 U.S.C. 438(a)(8), 441a, 441d, 441e, 441f, 441g, 441h, 441i)

[41 FR 35948, Aug. 25, 1976, as amended at 45 FR 15119, Mar. 7, 1980; 45 FR 27435, Apr. 23, 1980; 45 FR 43387, June 27, 1980]

PART 109—INDEPENDENT EXPENDITURES
(2 U.S.C. 431(17), 434(c))

§ 109.1 Definitions (2 U.S.C. 431(17) (1980)).

* * * *

(b) For purposes of this definition—

* * * *

(2) *Expressly advocating* means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as *vote for, elect, support, cast your ballot for,* and *Smith for Congress,* or *vote against, defeat,* or *reject.*

(3) *Clearly identified candidate* means that the name of the candidate appears, a photograph or drawing of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

* * * *

FEDERAL ELECTION COMMISSION

July 6, 1995

11 CFR Parts 100, 106, 109, and 114

[Notice 1995-10]

Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures

AGENCY: Federal Election Commission.

ACTION: Final rule; Transmittal of regulations to Congress.

SUMMARY: The Commission is issuing revised regulations that define the term "express advocacy" and describe certain nonprofit corporations that are exempt from the prohibition on independent expenditures. The new rules implement portions of several decisions issued by the Federal courts in recent years. These rules were originally part of a larger rulemaking on the scope of permissible and prohibited corporate and labor organization expenditures. The Commission expects to complete the remaining portions of the original rulemaking by issuing additional revisions to the regulations at a later date.

* * * *

Section 100.17—Clearly Identified (2 U.S.C. 431(18))

The definitions of "clearly identified" in 11 CFR 106.1(d) and "clearly identified candidate" in 11 CFR 109.1(b)(3) have been removed and replaced by a revised definition in section 100.17. It is not necessary for this definition to appear in multiple locations throughout these regulations.

The NPRM sought comments on two alternative approaches regarding the requirement that the candidates be "clearly identified." Alternative A-1 indicated that this would include candidates of a clearly identified political party and a clearly identified group of candidates,

such as the "pro-life" candidates in the *MCFL* case. Alternative A-2 did not specifically mention clearly identified groups of candidates or candidates of clearly identified political parties.

Several commenters and witnesses argued that under Alternative A-1, it could be too difficult to determine the candidates in the group. Examples cited were buttons that read "Elect Women for a Change" or "Vote Pro-Choice," without more. The language was intended to apply to a situation, for example, where one insert in a mailing lists voting records or positions on specific issues and clearly indicates which of the named candidates shares the speaker's views. If another insert urges the reader to vote in favor of candidates who share its views, this is considered to be advocating the election of those clearly identified candidates. Similarly, the *MCFL* case involved a flyer which urged voters to vote for "pro-life" candidates, and included a list of "pro-life candidates." Thus, in this example, several "pro-life" candidates were clearly identified to the reader.

In light of comments, the wording of new section 100.22(a) has been reworked to refer to "one or more clearly identified candidate(s)" to more clearly state what was intended. In addition, section 100.17 has been modified to provide some additional examples of when candidates are considered to be "clearly identified."

Section 100.22 Expressly Advocating

The definition of express advocacy previously located in 11 CFR 109.1(b)(2) has been replaced with a revised definition in new section 100.22. The placement of the definition of express advocacy in Part 100—Scope and Definitions is intended to ensure that the reader will be able to locate it more easily. Also, while express advocacy is an important component of any independent expenditure, it is also the legal standard used in determining whether other types of activities are expenditures

by corporations or labor organizations under 11 CFR Part 114. Please not that the terms "communication containing express advocacy" and "communication expressly advocating the election or defeat of one or more clearly identified candidates" have the same meaning.

The NPRM presented the possibility of creating a separate definition of "express advocacy" for inclusion in Part 114 that would apply only to corporations and labor organizations governed by that Part. The NPRM indicated that the purpose of promulgating a separate definition would be to focus more specifically on implementing the *MCFL* Court's dictate that "express advocacy" is the standard when determining what is an expenditure under 2 U.S.C. § 441b. The Notice suggested that a separate definition could center on whether a communication urged action with respect to a federal election rather than on whether the communication also related to a clearly identified candidate. Thus, this approach would have taken a different view of "express advocacy" for organizations subject to the prohibitions of section 441b.

There was little support for separate definitions from the comments and testimony. The difficulty the commenters and witnesses had in trying to determine what the courts meant by "express advocacy," and what they thought the Commission had in mind, amply demonstrate that it would be extremely confusing to work with separate definitions for corporations and labor organizations on one hand, and candidates, committees and individuals on the other. Consequently, separate definitions of express advocacy have not been included in the final rules.

1. *Alternative Definitions Presented in the NPRM*

The NPRM sought comments on two alternative sets of revisions to the definition of express advocacy. Alternatives A-1 and A-2 were similar in several respects. They both continued to list the specific phrases set forth in the *Buckley* opinion as examples of express advocacy.

Both alternatives recognized that all statements and expressions included in a communication must be evaluated in terms of pertinent external factors such as the context and timing of the communication. In addition, both proposed definitions clearly indicated that communications consisting of several pieces of paper will be read together.

The alternative definitions in the NPRM differed in several respects. Under Alternative A-1, express advocacy included suggestions to take actions to affect the result of an election, such as to contribute or to participate in campaign activity. In contrast, Alternative A-2 indicated that express advocacy constitutes an exhortation to support or oppose a clearly identified candidate, and that there must be no other reasonable interpretation of the exhortation other than encouraging the candidate's election or defeat, rather than another type of action on a specific issue. Nevertheless, Alternative A-2 also specifically stated that "with respect to an election" includes references such as "Smith '92" or "Jones is the One."

There was no consensus among the commenters and witnesses regarding either alternative definition of express advocacy. While there was more support for Alternative A-2 than A-1, specific portions of both alternatives troubled a number of commenters and witnesses. Some objected that Alternative A-1 was too narrow in that it did not cover all express, implied, or reasonably understood references to an upcoming election. Others argued Alternative A-1 was too broad, and preferred Alternative A-2. However, there was also considerable sentiment expressed that Alternative A-2 was also too broad, and should be further limited to avoid running afoul of the First Amendment considerations that are involved.

To illustrate the difficulty involved in applying an "express advocacy" standard, the Commission included Agenda Document #92-86-A in the rulemaking record. This document contained seven hypothetical advertisements, each of which is assumed to be published within

two weeks of an election. Several written comments and witnesses mentioned these examples in analyzing the proposals contained in this Notice, but there was no consensus as to which examples, if any, contained express advocacy.

In commenting on the proposed rules, the Internal Revenue Service indicated that 26 U.S.C. § 501(c)(3) prohibits certain nonprofit organizations from participating or intervening in political campaigns on behalf of or in opposition to candidates for elective public office. The IRS stated that prohibited political activity under the Internal Revenue Code is much broader in scope than the express advocacy standard under the FECA. The Commission expresses no opinion as to any tax ramifications of activities conducted by nonprofit corporations, since these questions are outside its jurisdiction.

The definition of express advocacy included in new section 100.22 includes elements from each definition, as well as the language in the *Buckley*, *MCFL* and *Furgatch* opinions emphasizing the necessity for communications to be susceptible to no other reasonable interpretation but as encouraging actions to elect or defeat a specific candidate. Please note that exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy. The expressions enumerated in *Buckley* included "support," a term that encompasses a variety of activities beyond voting.

2. *Examples of Phrases That Expressly Advocate*

The previous definition of express advocacy in 11 CFR 109.1(b)(2) included a list of expressions set forth in *Buckley*. Both alternatives in the NPRM would have largely retained this list of phrases that constitute express advocacy. The revised definition in 11 CFR 100.22(a) includes a somewhat fuller list of examples. The expressions enumerated in *Buckley*, such as "vote for," "Smith

for Congress," and "defeat" have no other reasonable meaning than to urge the election or defeat of clearly identified candidates.

3. *Communications Lacking Such Phrases*

The NPRM also addressed communications that contain no specific call to take action on any issue or to vote for a candidate, but which do discuss a candidate's character, qualifications, or accomplishments, and which are made in-close proximity to an election. An example is a newspaper or television advertisement which simply states that the candidate has been caring, fighting and winning for his or her constituents. Another example is a case in which a candidate is criticized for missing many votes, or for specific acts of misfeasance or malfeasance while in office.

Under Alternative A-2, these types of communications would have constituted exhortations if made within a specified number of days before an election, and if they did not encourage any type of action on any specific issue, such as, for example, supporting pro-life or pro-choice legislation. Comments were requested as to what an appropriate time frame should be—as short as 14 days, or as long as six months, prior to an election, or some other time period considered reasonable.

Some commenters opposed treating these communications as express advocacy on the grounds that there is not a clear call to action. Others argued that such communications, particularly when made by a candidate's campaign committee, were clearly intended to persuade the listener or reader to vote for the candidate.

Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate

in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis.

4. *Communications Containing Both Issue Advocacy and Electoral Advocacy*

The final rules, like the proposed rules, treat communications that include express electoral advocacy as express advocacy, despite the fact that the communications happen to include issue advocacy, as well. Several comments pointed out that the legislative process continues during election periods, and argued that if a legislative issue becomes a campaign issue, the imposition of unduly burdensome requirements on those groups seeking to continue their legislative efforts and communicate with their suppoters is unconstitutional. These concerns are misplaced, however, because the revised rules in section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages. As noted in *Buckley*, the FECA applies only to candidate elections. See, e.g., 424 U.S. at 42-44, 80. For example, the rules do not preclude a message made in close proximity to a Presidential election that only asked the audience to call the President and urge him to veto a particular bill that has just been passed, if the message did not refer to the upcoming election or encourage election-related actions. In contrast, under these rules, it is express advocacy if the communications described above urged the audience to vote against the President if the President does not veto the bill in question.

Nevertheless, to alleviate the commenters' concerns, the definition of express advocacy in new section 100.22(b) has been revised to incorporate more of the *Furgatch* interpretation by emphasizing that the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable

minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action.

Both alternative definitions of express advocacy included consideration of the context and timing of the communication, and indicated that communications consisting of several pieces of paper will be read together. Several commenters and witnesses were troubled by the perceived vagueness and uncertainty inherent in the use of the phrases "taken as a whole," "in light of the circumstances under which they were made," and "with limited reference to external events." They argued that they would not be able to ascertain in advance which facts and circumstances would be considered by the Commission. Some of the commenters and witnesses acknowledged the difficulty of crafting a clear and precise standard in the First Amendment context.

The final rules in section 100.22 retain the requirement that the communication be read "as a whole and with limited reference to external events" because *MCFL* makes clear that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy. *See* 479 U.S. at 249-50. Further, the *Furgatch* opinion evaluated the contents of the communication in question "as a whole, and with limited reference to external events." 807 F.2d at 864. The external events of significance in *Furgatch* included the existence of an upcoming presidential election and the timing of the advertisement a week before the general election. However, please note that the subjective intent of the speaker is not a relevant consideration because *Furgatch* focuses the inquiry on the audience's reasonable interpretation of the message. *Furgatch*, 807 F.2d at 864-65.

5. *"Vote Democratic" or "Vote Republican"*

In the NPRM, Alternative A-2 treated as express advocacy messages such as "Vote Republican" or "Vote

Democratic" if made within a specified period prior to a special or general election or an open primary. Again, comments were sought on time periods ranging from 14 days to 6 months prior to an election, or any other time period considered reasonable. Alternatively, the period between the primary and general elections was suggested as the time when such messages refer to clearly identified candidates. In contrast, Alternative A-1 treated these phrases as express advocacy if made at any time after specific individuals have become Republican or Democratic candidates within the meaning of the FECA in the geographic area in which the communication is made. The NPRM also sought comments on when a message such as "Vote Democratic" or "Vote Republican" refers to one or more clearly identified candidates, rather than being just a message of support for a party.

The views of the commenters and witnesses reflected little consensus regarding these messages. Several were supportive of Alternative A-2, and suggested that a 90 day time frame would be appropriate. Others felt that such messages are always express advocacy because they aim at influencing the outcome of elections. Conversely, some commenters argued that these messages cannot be express advocacy if there are no declared candidates yet running for the party's nomination or if the nominee of the party has not yet been selected.

Section 100.22 of the final rules does not specify a time frame or triggering event that will cause these messages to be considered express advocacy. Instead, messages such as "Vote Democratic" or "Vote Republican" will be evaluated on a case-by-case basis to determine whether they constitute express advocacy under the criteria set out in 11 CFR 100.22(b).

* * * *

§ 100.17 Clearly identified (2 U.S.C. 431(18)).

The term *clearly identified* means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an

unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

3. 11 CFR Part 100 is amended by adding section 100.22 to read as follows:

§ 100.22 Expressly advocating (2 U.S.C. 431(17)).

Expressly advocating means any communication that—
(a) Uses phrases such as "vote for the President," "reelect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Regan/Bush" or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

* * * *

FEC ADVISORY OPINIONS 1978-46

[Reproduced from CCH, Federal Election Campaign Financing Guide]

[¶ 5348] *AO 1978-46: Corporate Support for Party Convention*

[*Corporate contributions via advertisements or the purchase of exhibit space at a party convention, as well as advertisements in a party newsletter, are allowed only if apportionable to state and local candidates as opposed to federal candidates. Answer to Wayne J. Thorburn, Executive Director, Republican Party of Texas, 1011 Congress Avenue, Suite 520, Austin, Texas 78701.*]

This letter is in response to yours dated July 14, 1978, concerning the 1978 Republican State Convention of Texas and the party newspaper published by the Republican Party of Texas. Specifically, you ask whether Federal statutes, regulations or FEC Advisory Opinions exist which would limit:

(1) solicitation of corporate advertisements in a printed program for the 1978 Republican State Convention of Texas;

(2) sale of exhibit space by the convention to corporations;

(3) advertising by corporations in the Party's monthly newspaper.

The Federal statute relevant to your questions is 2 U.S.C. § 441b. This provision of the Federal Election Campaign Act of 1971, as amended prohibits:

(1) Contributions or expenditures by national banks and Federally chartered corporations in connection with any election to Federal, State, or local political office, and

(2) Contributions or expenditures by any corporation in connection with any Federal election or "in connection with any primary election or political convention or caucus held to select

candidates for" the offices of President, Vice-President, Senator, and Representative in Congress, and

(3) Knowing acceptance of such contributions by any candidate, political committee or other person.

Therefore, to the extent the Republican State Convention of Texas is for the purpose of influencing or "in connection with" a Federal election and funds paid by corporations for advertising or exhibit space are used to defray expenses of the convention, those funds would be corporate contributions or expenditures that are prohibited under § 441b(a) as outlined above. Similarly, the Party newsletter could not be financed with proceeds from corporate ads to the extent its purpose is to influence Federal election or it is connected with a Federal election.

Nominations of Federal office candidates by the Texas Republican Party were required under Texas law to be made by primary election (held on May 6, 1978) rather than Party convention. However the Republican State Convention of Texas, may still be deemed to be, at least in part, for the purpose of influencing or "in connection with" a Federal election. Texas law provides that State conventions be held "between the first and third Tuesdays, exclusive, in September." Tex. Elec. Code, art. 13.35. The duties of the State convention are outlined in Texas law and primarily relate to candidates for State offices. The convention also announces "a platform of principles" and elects officers and members for the State executive committee of the Party. See Tex. Elec. Code, arts. 13.37, 13.38. The Texas statute does not preclude the State Convention from activities involving communications influencing the election of candidates to Federal office or otherwise connected with a Federal election. Therefore, if the State Convention provides a forum for candidates for Federal office which involves (1) the solicitation, making or acceptance of contributions to a campaign for

Federal office, or (2) any communication expressly advocating the election or defeat of a clearly identified candidate for Federal office, the Convention would be regarded as for the purpose of influencing and in connection with a Federal election. The prohibitions of 2 U.S.C. § 441b would bar the financing of all Convention expenses with corporate treasury funds, but such funds could be used (assuming it is proper under Texas law) to defray Convention expenses that are not allocable to Federal election purposes.

In concluding that some expenses of the Convention may be allocable as influencing Federal elections, the Commission would not require that such allocable amount be further allocated to specific candidates for Federal office. Specific Federal candidate allocation would only be necessary where a Convention expenditure was made on behalf of a clearly identified candidate for Federal office to whom it could be directly attributed. See § 106.1 of Commission regulations. If the Convention has any relationship to Federal elections, as discussed above, the expenses allocable to Federal election purposes must be paid from the Texas Republican Party's Federal campaign committee established pursuant to § 102.6(a) of Commission regulations. The amount of expenditures allocable to the Federal campaign committee may be determined by using the formula set forth in § 106.1(e) of Commission regulations. Other allocation formulas are explained in the Commission's response to Advisory Opinion Request 1976-72 and in a guideline published in the *FEC Record* of December 1977. (Copies are enclosed.)

If the State Convention is related only to State elections and does not involve any activities bearing on Federal elections as discussed above, expenses of the Convention would not be expenditures under the Act. Therefore, they would not have to be reported (assuming they are paid by a non-registered party organization); nor would the pro-

hibitions of 2 U.S.C. § 441b apply except as to contributions by national banks and corporations organized by authority of a law of Congress. (See also 2 U.S.C. § 441e which bars contributions by foreign nationals in connection with an election to any political office.)

Regarding the acceptance of corporate funds for advertisements placed in a monthly party newsletter of the Texas Republican Party, the Commission concludes that under the Act such funds would be contributions. However, if proper under Texas law, proceeds from corporate ads could be accepted by the Party and used for State or local election purposes.* The expenses of preparing, publishing, and distributing the newsletter would be regarded as Federal election-related if communications carried in the newsletter are for the purpose of influencing the election of any person to Federal office. Thus if any material published in the newsletter relates to Federal elections, expenses incurred for the newsletter need to be paid, on an allocated basis, from the Federal campaign committee of the Texas Republican Party. The formulas mentioned above may be used to compute the allocable amount. In addition, an allocation based upon the column inches (or space) devoted to Federal candidates as a class, without express advocacy of specific Federal candidates, may be used to determine the amount of expenses required to be paid and reported by the Federal campaign committee of the Party.

However, if the newsletter includes communications expressly advocating the election or defeat of a clearly identified candidate for Federal office, the expenses of the newsletter attributed to those communications (to be determined by an allocation formula based on columns or amount of space utilized for the communication in relation to the entire newsletter) must be treated as a general election expenditure of the Party under 2 U.S.C. § 441a(d). It must be paid from funds of, and reported by, the Federal campaign committee pursuant to § 110.7 of Commission regulations. See also § 104.2(b). This conclusion follows from Commission regulations on allocation which require that expenditures for "general administrative . . . and other day-to-day costs of political committees" have to be attributed to individual candidates for Federal office when they are "on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate." 11 CFR 106.1(c).

* It appears that Texas Election Code, arts. 14.01(D), (E), 14.06, and 15.17 may be relevant.

On the other hand, if the Party's newsletter is completely devoid of both general and specific communications relating to candidates for Federal office, the expenses of preparing, publishing and distributing it would not involve contributions or expenditures under the Act and Commission regulations.

Those portions of this opinion relating to the Party's newsletter supercede and modify, in part, the Commission's responses to Advisory Opinion Request 1976-65, issued September 21, 1976.

This response constitutes an advisory opinion concerning the application of a general rule of law stated in the Act, or prescribed as a Commission regulation, to the specific factual situation set forth is your request. See 2 U.S.C. § 437f.

Dated: September 5, 1978.

DISSENTING OPINION OF COMMSSIONER HARRIS, AO 1978-46

I dissent from this opinion for the reasons outlined in my dissent to Advisory Opinion 1978-10.

I do not share the majority's view that "allocation" is the panacean solution to the difficult problems created under our Act by state party spending for mixed state/federal purposes. Nor do I agree that expenditures allocated to non-federal purposes may be paid out of "restricted" corporate and union treasury funds.

As I have argued previously, the allocation formulas on which the Commission rests its action today inevitably result in the attribution of all corporation and labor treasury contributions to state elections and all "unrestricted" individual and committee contributions to federal elections. Allocation thus "is of bookkeeping significance only rather than a matter of real substance." *Abood v. Detroit Board of Education*, 431 U.S. 209, 237, n. 35 (1976) *citing Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963).

The reality is that this mechanism provides a means by which corporations and unions can foot the bill for the greater part of a state party's administrative and operating expenses. By paying a larger share of these costs, corporations and unions subsidize the party's federal activities. Such subsidy is, in my opinion, a contribution in connection with federal elections in violation of 2 U.S.C. 441b.

Once again the Commission is thwarting the design of Congress to lessen the influence of corporate and union money in federal elections.

Dated: September 5, 1978.

FEC ADVISORY OPINION 1984-15

[Reproduced from CCH, Federal Election Campaign Financing Guide]

[¶ 5766] *AO 1984-15: Reporting Expenditures for Anti-Democratic Television Ads*

[If the Republican Party pays for a series of television ads denigrating the potential Democratic presdential candidates, the expenditures would be considered coordinated expenditures unless the Republican candidate chooses not to accept federal funds, in which case they would be contributions. Answer to E. Mark Braden, Republican National Committee, Dwight D. Eisenhower Republican Center, 310 First Street, S. E., Washington, D. C. 20003.]

This responds to your letter of April 2, 1984, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to disbursements by the Republican National Committee for a proposed national television advertising program.

You state that the Republican National Committee [1] intends to undertake a national television advertising program. In your request you included two proposed scripts for the television advertisements. In a script on the subject of the Federal budget deficit, the video opens with the U.S. Capitol and fades to an image of one of the current Democratic presidential candidates. The audio portion begins with the candidate's comments about the deficit. An announcer then interjects: "That's what you said. But look what you've done . . . ." An animated graph then depicts a rise in deficits during the candidate's tenure in Congress. The advertising concludes with the statement: "Act today to preserve tomorrow. Vote Republican."

---

[1] The Republican National Committee ("RNC") is a qualified, multi-candidate political committee and the national committee of the Republican Party. See 2 U.S.C. § 431(4), § 431(14), and § 441a(a)(4).

In the second script, the video opens with a portrait of a current candidate for the Democratic presidential nomination with the camera slowly zooming in on the portrait and then holding the image. The audio portion identifies the candidate by name and states that he "said he'd bring new ideas and morality to government. But look at the list of the new ideas." The audio continues with a "long list of inconsistencies of the candidate" and sums up with these questions: "This is moral leadership? These are new ideas?" Both the video and the audio conclude with the statement: "Vote Republican."

You state that the Republican National Committee intends to produce and air this advertising program prior to and after the nomination of a Democratic candidate for President. You request an opinion concerning the treatment of the disbursements by the Republican National Committee for the production and placement of general electronic media advertisements using these or similar scripts. Your request specifically raises five questions:

(1) how should disbursements by the Republican National Committee for its proposed national television program be reported to the Commission?

(2) would these disbursements count against the expenditure limitations of 2 U.S.C. § 441a(d)?

(3) is the characterization of these disbursements affected by the timing of the broadcast of these advertisements either before or after the Democratic presidential nomination?

(4) would the characterization of these disbursements be affected by an express statement of the purpose of the advertisements as letting a particular Democratic candidate's own words be used against him?

(5) would the characterization of these disbursements be affected by a statement of the advertisement's purpose as the defeat of the Democratic Party's candidates generally without identifying as a purpose the defeat of any specific candidate?

To facilitate a proper analysis, these questions are answered in a slightly altered sequence.

Because these contemplated expenditures would relate to an election for Federal office, they would be governed by the Act, and thus reportable. Under the Act, a national party committee may report disbursements in one of eight categories. See 2 U.S.C. § 434(b)(4); 11 CFR 104.3(b)(1), and FEC Form 3X.[8] Four reporting categories—transfers to affiliated committees, loans, loan repayments, offsets—are clearly not applicable to your request. The "operating expenditures" category includes disbursements for such expenses as polling, travel, phone banks, catering, media, rent, personnel, overhead, fundraising, training seminars, registration and get-out-the-vote drives, and other day-to-day costs that are not made on behalf of a clearly identified candidate and cannot be directly attributable to that candidate. See 11 CFR 104.3(b)(3)(i), 106.1(c), and 110.8(e). The amount of these expenditures is not subject to any limitations. See Advisory Opinion 1975-87 [¶ 5178]. The Commission concludes, however, that expenditures for the television advertisements proposed in this request are not, with one possible exception, the type of expenditures that are properly reportable as "operating expenditures."

The remaining reporting categories are contributions to political committees, coordinated party expenditures, and other disbursements. The reporting category for contribution to political committees includes disbursements to a candidate and his or her authorized campaign committees. See 11 CFR 104.3(b)(3)(v). This category also covers in-kind contributions. 11 CFR 100.7(a)(1)(iii). For a

[8] Also, a national party committee is incapable of making independent expenditures. *See* Advisory Opinion 1980-119 [¶ 5472].

multicandidate political committee, a $5,000 limitation applies to contributions to a candidate and his or her authorized campaign committees with respect to any election for Federal office. 2 U.S.C. § 441a(a)(2); 11 CFR 110.2(a)(1). Coordinated party expenditures are expenditures by the national committee of a political party in connection with the general election campaign of any candidate for President of the United States who is affiliated with that party. 2 U.S.C. § 441a(d)(2). The amount of these expenditures is subject to a specific dollar limitation. *Id.* The "other disbursements" category covers disbursements not otherwise reportable under the other categories. 11 CFR 104.3(b)(3)(ix). No dollar limitation applies to these disbursements.[3]

The threshold question concerns whether the timing of the broadcast of the RNC's proposed television advertisements, either before or after the Democratic presidential nomination, would affect the characterization of RNC expenditures for these advertisements: either as contributions to a candidate or as coordinated party expenditures. Although timing is relevant, the Commission does not view the timing of the broadcasts as controlling how expenditures for the advertisements should be treated for limitation and reporting purposes. First, with regard to viewing the expenditures as contributions to a candidate, Commission regulations contemplate that contributions may be received with respect to the general election before the date of the primary election or nomination. See 11 CFR 102.9(a). Second, the Commission notes that nothing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election.

[3] To the extent that disbursements for the proposed television advertisement relate to any election for Federal office, they cannot be made with funds from prohibited sources. See Advisory Opinions 1978-46 [¶ 5348] and 1978-10 [¶ 5340]. See also Advisory Opinion 1982-5 [¶ 5659].

The Act refers to expenditures "in connection with the general election campaign. . . ." Where a candidate appears assured of a party's presidential nomination, the general election campaign, at least from the political party's perspective, may begin prior to the formal nomination. Thus, national party expenditures in connection with that campaign are possible. Furthermore, because the national party committee rather than the candidate or his principal campaign committee makes these expenditures, whether a specific nominee has been chosen, or a candidate assured of nomination, at the time the expenditures are made, is immaterial.[4] Although consultation or coordination with the candidate is permissible, it is not required. See Advisory Opinion 1975-120 [¶ 5186]. The act gives a national party committee only one coordinated party expenditure limit with respect to the presidential general election campaign.[5] To permit expenditures made prior to nomination but with the purpose and effect of influencing the outcome of the presidential general elec-

[4] Significantly, § 441a(d) does not by its terms refer to candidates for Federal office as the party's nominee; it refers to such candidates only as those who are "affiliated with" the political party. By contrast, in other contexts where Congress was concerned with the status of Federal office candidates as regards political party activity, it has explicitly referred to "nominees of" the political party. See 2 U.S.C. §§ 431(8)(B)(x), (8)(B)(xii), (9)(B)(viii), and (9)(B)(ix), which exempt certain State and local committee activities "on behalf of nominees of" the party from limitation as a contribution or party expenditure. Also, see 2 U.S.C. § 432(e)(3)(A) which refers to the presidential candidate "nominated" by a political party, and 2 U.S.C. § 441a(a)(7), § 441a(b)(2) which both refer to the candidate of a political party "for election" to the office of President.

[5] This provision sets a single limitation for coordinated party expenditures for President at the national level. Therefore, if disbursements for these proposed advertisements were made by the national senatorial or congressional campaign committees, such disbursements would be allocable to the single expenditure limitation of 2 U.S.C. § 441a(d)(2). *See generally* Advisory Opinions 1980-119 and 1976-108 [¶ 5236].

tion to escape this limitation would be inconsistent with the purpose and intent of 2 U.S.C. § 441a(d). *See generally* Advisory Opinion 1975-72 [¶ 5152]. Therefore, the proper analytical focus is whether the expenditures for the television advertisements proposed in this request are made for the purpose of influencing the outcome of the general election for President of the United States. See 2 U.S.C. § 431(8)(A)(i), § 431(9)(A)(i), and § 441a(d)(2). There is no question that expenditures for these advertisements after the nominating conventions would be expenditures in connection with the presidential general election campaign.[6] This responds to question three.

In your request, you state that the proposed television advertisements will show the image or portrait of one of the current Democratic presidential candidates. They will quote statements by that candidate about the budget deficit or government morality and depict his record relating to those statements. Each advertisement concludes with a visual and audio appeal to "Vote Republican." These advertisements will be broadcast to the general public. The proposed advertisements will prominently display visual images of a current candidate for the Democratic Party's presidential nomination and will emphasize verbal statements by or about such candidate. The advertisements will question or challenge the candidate's statements, position, or record. They will conclude with a partisan statement to "Vote Republican." The clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and

[6] Although not explicitly stated in your request, the Commission assumes that such advertisements would feature the Presidential nominee of the Democratic Party.

any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. The only election which will pose such a choice is the presidential general election. These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.[7]

As such, these expenditures are only reportable either as contributions or as coordinated party expenditures. Thus, the Republican National Committee could report expenditures for these advertisements, up to a maximum of $5,000, as an in-kind contribution to the Republican presidential candidate with respect to the 1984 general election. However, if the Republican presidential candidate in the 1984 general election chooses to accept public funding pursuant to 26 U.S.C. § 9001 *et seq.*, he may not accept contributions, except for certain limited exceptions that are not applicable here. See 26 U.S.C. § 9003(b)(2); 11 CFR 9003.2(a)(2). Accordingly, in such circumstances the Republican National Committee could not report expenditures for these advertisements as an in-kind contribution to the Republican presidential candidate. Instead, it could then only report these expenditures as coordinated party expenditures pursuant to 2 U.S.C. § 441a(d)(2) on Schedule F of FEC Form 3X. *See generally* Advisory Opinions 1978-89 [¶ 5384] and 1978-46. This responds to questions one and two.

[7] The addition of a statement of purpose as described in question four reinforces the characterization of these advertisements as relating to the presidential general election. This footnote responds to question four.

Your fifth question does not state whether the proposed advertisement would refer to all Democratic presidential candidates without identifying any specific candidate or to all Democratic candidates for all Federal offices without identifying any specific candidate or office. If the reference is to all Democratic presidential candidates generally, the characterization of the advertisements and the reporting requirements for the disbursements would remain unchanged from that set forth above. If, however, the reference is to all Democratic candidates generally without identifying (by visual image or audio content) any specific candidate or office, the disbursements would not then be attributable to any candidate or to any campaign for any particular Federal office. Instead, they would be characterized as advertisements promoting the Republican Party over the Democratic Party and to encourage voters to support the Republican Party generally. As such, the disbursements for such advertising would not be reportable as contributions to any specific candidate or as coordinated party expenditures in connection with any specific general election campaign for President, Senator, or Representative. See Advisory Opinions 1978-46 and 1975-87. Such disbursements would be reportable as operating expenditures of the Republican National Committee that are generally related to Federal elections although not on behalf of any clearly identified candidate for Federal office, nor directly attributable to such a candidate. See 11 CFR 104.3(b)(3)(i) and 106.1(c).

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activities set forth in your request. See 2 U.S.C. § 437f.

Dated: May 31, 1984.

P.S. Commissioners Aikens and Elliott voted against approval of this opinion and will file dissenting opinions at a later date.

FEC ADVISORY OPINION 1985-14

[Reproduced from CCH, Federal Election Campaign Financing Guide]

[¶ 5819] *AO 1985-14: Attribution of Congressional Campaign Committee Expenditures*

[*A campaign involving radio and television ads and direct mailings by a congressional campaign committee would not be subject to limitations where a specific opposition candidate was not named or where one was named but there was no encouragement to vote for the committee's candidate. However, a mailing in a specific opposition candidate's district would be subject to limitation. Answer to Robert F. Bauer of Parkin, Coie, Stone, Olsen & Williams, 1110 Vermont Avenue, N.W., Washington D.C. 20005.*]

This responds to your letters of March 18 and April 9, 1985, requesting an advisory opinion on behalf of the Democratic Congressional Campaign Committee ("DCCC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the allocation and reporting of expenditures for certain political advertisements.

DCCC is registered with the Commission as a party-related, multicandidate political committee. You state that DCCC is "[o]rganized and operated by Democratic members of the House of Representatives" and "functions broadly as a national party organization in support of Democratic candidates to the House, as well as other public offices around the country." You state that DCCC plans to initiate a program involving criticism of the records of individual Republican members of the House of Representatives and of the activities of Republican Members of Congress as a class. Some of these Republican members may not be announced candidates for the 1986 elections, while some will have qualified as candidates pursuant to the Act. See 2 U.S.C. § 431(2).

You state that DCCC plans to focus its program in 20-100 selected congressional districts but may expand

it to include all districts represented by Republicans. You add that DCCC's program will have "the clear purpose of influencing voter perceptions of these candidates with a view toward weakening their positions as candidates for re-election in 1986." You state that some of the proposed communications will refer to the next or the last election, while other communications will criticize a congresman's record without any reference to any election or without any express advocacy language. These communications will include television and radio broadcasts, newspaper and other print advertising, and direct mail brochures. You propose to produce and disseminate these communications currently and in September 1985.[1]

In this context, you have provided the scripts for radio and television broadcasts and the text for a direct mail brochure:

"PLIERS AND TOILET SEATS" (Radio/TV)

Democratic Congressional Campaign Committee

Background: Loud laughter and applause

Voice No. 1: What's going on? Wha—so funny?

Voice No. 2: (laughing intermittently): Oh, that's the President getting a good laugh from the crowd in Washington, the Republicans in Congress. He says we should take care of the farm crisis by keeping the grain (begins to burst into uncontrolled laughter)—and exporting the farmers!!!

Voice No. 1: (with anger): That's not funny at all; this farm crisis is real and endangering the very existence of family farms. People are really suffering.

[1] Your request indicates a schedule of April and September 1985, but you also note that this proposed schedule as to April will be adjusted depending on the timing of the Commission's response to your request.

Voice No. 1: Who cares? The Republicans sure don't. So just join the crowd and have a good laugh.

Announcer: But it is not a laughing matter. The President and his Republican supporters in Congress are enjoying this joke at the expense of the American farmer —but the last laugh is on you and on your children. And while the Republicans are breaking every election-year promise they ever made to the American farmer, they just look on and smile when multi-billion dollar defense contractors charge you—the taxpayer—$——— for a pair of pliers and $——— for a toilet seat. That's the real joke.

(Pause)

Announcer: Let your Republican Congressman know that you don't think this is funny.

(Or, in some ads: Let the Republicans in Congress know what you think about their sense of humor.)

[In some scripts, the text closes with "Vote Democratic"]

"Crumbling Foundation" (Radio/TV)

Democratic Congressional Campaign Committee

Sound: A crumbling, cracking sound of something "giving away."

Announcer (with sound in background): You read the newspaper nowadays and what do you find: stories about collapsing banks, people in a panic over the loss of their savings, federal and state government coming up with rescue plans and bailouts.

(Sound in background increases in volume)

Announcer: The President and his Republican allies in Congress are all smiles, they tell us not to worry. But under their leadership, the budget deficit grows to

monstrous proportions, Wall Street is nervous, the dollar begins to show signs of weakness.

(Sound comes to fore, very loud and then replaced by a moment of silence)

Announcer: We've seen all this before: let's make sure it doesn't happen again. Let your Republican Congressman (or in some ads, the Republicans in Congress) know that their irresponsible management of the nation's economy must end—before it's too late.

[In some scripts, the text closes with "Vote Democratic"]

SAMPLE MAILER

17 x 22/One Fold

Front Face
8½ x 11

Bulk mail

Wave of the future?

[dye-cut; beautiful sunset; couple walking in ocean surf/beach]

Fold

Inside
17 x 22

The wave of the future could be an oil spill if Cong. X has his way!

[Picture of giant oil-derrick in ocean ruins the lovely picture]

Text

List of X's contributions from oil industry

[Same couple on beach]

Back Cover
8½ x 11

Don't be fooled by Republican rhetoric. Save our coastal environment.

Let Congressman X know how you feel.

[In some scripts, the text closes with "Vote-Democratic".]

You seek to determine whether DCCC's expenditures for these planned communications must be considered attributable contributions or expenditures under 11 CFR 106.1 and Advisory Opinion 1984-15 [¶ 5766]. You have presented several specific questions:

1. Would broadcast advertisements and other general public communications (e.g. direct mail, leaflets, etc.) that specifically identify Republican congressmen and criticize their records, require allocation under 11 CFR 106.1(a) and AO 1984-15? Does the answer depend on whether the communications contain reference to "elections" or any "express advocacy" language?

2. Would broadcast advertisements and other general public communications that criticize the activities and record of Republican congressmen as a class require allocation under 11 CFR 106.1(a) and AO 1984-15 to the individual Democratic candidates, when ultimately nominated by the Democratic Party?

3. Does the answer to question 2 differ if DCCC directs these "generic" critiques to selected congressional districts?

DCCC's payments for these communications are reportable expenditures for the purpose of influencing Federal elections, and the sources of the funds used by DCCC to make these expenditures are subject to the limitations

and prohibitions of the Act. See 2 U.S.C. § 434, § 441a, § 441b, § 441c, § 441e, and § 441f. Your questions relate to whether these expenditures are attributable to a specific candidate or candidates and, thus, subject to the Act's limitations on those contributions or expenditures made by DCCC.

You state that there may be no Democratic candidate, either announced or qualified under the Act, in the congressional districts selected to receive DCCC's expenditures for these communications will not be made in cooperation or consultation with any candidate.[3] Instead, the Commission views your request as limited to the situation where expenditures for these communications are made without any consultation or cooperation, or any request or suggestion of, candidates seeking election to the House of Representatives in the selected districts.

In this context, the Act's limitations at 2 U.S.C. § 441a (d) become relevant since the Commission has stated that expenditures pursuant to 2 U.S.C. § 441a(d) may be made without consultation or coordination with any candidate and may be made before the party's general election candidates are nominated. See Advisory Opinion 1984-15.[3] This section permits "the national committee of a political party" to make additional expenditures, subject to ceertain specific dollar limitations, "in connection with the general election campaign of a candidate for" the House of Representatives "who is affiliated with such party." 2 U.S.C. § 441a(d)(3).[4] A

[3] See 2 U.S.C. § 441a(a)(7)(B)(i); 11 CFR 104.3(b) and 104.13(a).

[3] This interpretation is consistent with the reporting requirements. Expenditures made under § 441a(d) and 11 CFR 110.7 are reported as expenditures by the committee making them. 11 CFR 104.3(b)(3)(viii). The candidate on whose behalf such expenditures are made, however, does not report these expenditures as contributions. 11 CFR 104.3(a)(3)(iii).

[4] Party political committees are incapable of making independent expenditures. 11 CFR 110.7(a)(5) and (b)(4); Advisory Opinions

national committee of a political party, as defined at 2 U.S.C. § 431(14), may designate the party's congressional campaign committee as its agent for purposes of making these expenditures, if such designation occurs before the designee committee makes the expenditures. See 11 CFR 110.7(a)(4); *FEC v. Democratic Senatorial Campaign Committee* [¶ 9164], 454 U.S. 27, 28-29 (1981); First General Counsel's Report, MUR 1460.[5]

In Advisory Opinion 1984-15, the Commission considered the application of the limitations of 2 U.S.C. § 441a (d) to expenditures for political advertising similar to DCCC's proposed communications. There, the Commission concluded that the limitations of § 441a(d) would apply where the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message. See also Advisory Opinion 1978-46 [¶ 5348]. Under the Act and regulations, a candidate is clearly identified if his or her name or likeness appears or if his or her identity is apparent by unambiguous reference. 2 U.S.C. § 431(18); 11 CFR 106.1(d). Electioneering messages include statements "designed to urge the public to elect a certain candidate or party." *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957); see Advisory Opinion 1984-62 [¶ 5813].

Both the "pliers and Toilet Seats" and the "Crumbling Foundation" scripts offer two alternative taglines: one referring to "your Republican Congressman" and one re-

1984-15 and 1980-119 [¶ 5561]; General Counsel's Report, MUR 273.

[5] For purposes of this advisory opinion, the Commission assumes that DCCC is or will be the designated agent of the national committee of the Democratic Party for the purpose of making expenditures pursuant to 2 U.S.C. § 441a(d)(3). This expenditure limitation is in addition to the limitation on contributions by DCCC pursuant to 2 U.S.C. § 441a(a)(2)(A). See 11 CFR 110.7(b)(3); H.R. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976), *reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1976*, 1053 (GPO 1977).

ferring to "the Republicans in Congress." You further state that some scripts will also close with a "Vote Democratic" statement. The Commission concludes that DCCC's expenditures for its proposed radio and television advertisements (with scripts as set forth in this opinion) that use the taglines, "the Republicans in Congress," either with or without the "Vote Democratic" statement (or other electioneering message), will *not* be subject to the Act's limitations. In addition, the Commission concludes that DCCC's expenditures for its proposed advertisements that use the tagline, "your Republican Congressman," *without* the "Vote Democratic" statement, will also *not* be subject to the Act's limitations. Instead DCCC may report these expenditures as operating expenditures. See 11 CFR 104.3(b). These conclusions also apply where the advertisements are directed to only selected congressional districts.

With respect to DCCC expenditures for the proposed radio and television advertisements that use the tagline, "your Republican Congressman," together with the "Vote Democratic" statement, the Commission considered alternative responses but on a tie vote was unable to agree whether such expenditures would or would not be subject to the Act's limitations and attributable pursuant to 11 CFR 106.1. See 11 CFR 112.4(a).

With regard to DCCC's proposed sample mailer, the Commission assumes that its references to "Cong. X" indicate that a specific congressman will be idenified by name. The Commission also assumes that the mailer's dissemination may include part or all of the district represented by the identified congressman. The Commission concludes that DCCC's expenditures for producing and disseminating the mailer either with or without the "Vote Democratic" statement will be subject to the Act's limitations and attributable pursuant to 11 CFR 106.1.

You have indicated that DCCC's proposed program is for the purpose of influencing the 1986 election process

and that these activities will be scheduled for approximately the next month and for September 1985. The Commission emphasizes that this opinion is limited to the timetable you have specified and does not address the implementation of the same or similar program at some later date.

The Commission notes the foregoing discussion responds to the three questions you presented in your letter dated March 18, 1985.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activities set forth in your request. See 2 U.S.C. § 437f.

Dated: May 30, 1985.

(5)

No. 95-489

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE
and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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62 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does 2 U.S.C. § 441a(d) violate the First Amendment by infringing on a political party's rights of political expression and association?

2. Must 2 U.S.C. § 441a(d) be construed to apply only to communications that contain "express advocacy" to avoid unconstitutional vagueness?

3. Is a statutory interpretation by the Federal Election Commission entitled to deference when that interpretation (a) raises serious constitutional problems; (b) conflicts with the clear meaning of the statute; (c) originates in an Advisory Opinion; and (d) is not adequately justified?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 95-489

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE
and DOUGLAS L. JONES, as TREASURER,
Petitioners,
v.
FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS

Petitioners Colorado Republican Federal Campaign Committee and Douglas L. Jones as Treasurer [1] respectfully request that the Court reverse the judgment in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The September 6, 1995, order of the court of appeals denying the Colorado Party's suggestion for rehearing *en banc* is unreported and is reproduced at 49-50 of the Joint Appendix ("J.A."). The June 23, 1995, panel opinion reversing the district court is reported at 59 F.3d 1015 and is reproduced at J.A. 32-48. The August 30, 1993, order and memorandum decision of the United States District Court for the District of Colorado dismiss-

[1] All parties to this case are identified in the caption. The Treasurer is a nominal party. For simplicity, Petitioners will be referred to collectively as "Colorado Party" or "Party."

ing the complaint of the Federal Election Commission ("FEC" or "Commission") is reported at 839 F. Supp. 1448 and is reproduced at J.A. 17-31.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statute involved in this case is the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-455 (1994).[2] Section 441a(d) of the Act in relevant part states:

> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> . . .
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make an expenditure in connection with the general election campaign of a candidate for Federal office

[2] Section references within this brief are to Title 2 of the United States Code unless otherwise noted.

> in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

J.A. 222-23. Other statutory provisions involved in this case are set out in their entirety at J.A. 217-38.

STATEMENT OF THE CASE

The Colorado Party, like any political party, wants to publicize its support for or opposition to candidates for election to federal office. However, the pennies-per-voter expenditure limit imposed on the Colorado Party by § 441a(d) does not permit the Party to send out a single letter to each potential Colorado voter, or even to each Colorado Republican. To do so would exceed the limit and invite civil or criminal prosecution by the United States government. The reality of this risk is shown by the FEC's attempt in this case to penalize the Colorado Party for a radio advertisement—run four months before either party had selected its senatorial nominee and seven months before the general election—that addressed important issues raised by an incumbent Congressman but, as the FEC concedes, did not expressly advocate the election or defeat of any candidate.[3] Absent this threat,

[3] The trial court ruled there was no express advocacy, and the FEC stated to the court of appeals that the agency did not challenge that finding. *See* Opening Appeals Brief for the Federal Election Commission at 20 n.4.

the Colorado Party is ready, willing and able to support the election or defeat of candidates for federal office at a level above the pennies-per-voter limit.

The primary relief sought by the Colorado Party is a declaration that § 441a(d) violates the First Amendment. The constitutionality of that provision was expressly noted and reserved in *Buckley v. Valeo*, 424 U.S. 1 (1976). If that declaration is granted, the rest of this appeal is moot.

When the Colorado Party sponsored the radio advertisement for which it is being prosecuted here, the Party believed that it was in compliance with § 441a(d) because the advertisement did not include "express advocacy" and thus was not "in connection with" any election as this Court has construed that phrase. The FEC contends, however, that § 441a(d) actually extends to any "electioneering message," an ill-defined concept which takes into consideration the speaker's subjective intent. If § 441a(d) is not ruled unconstitutional, the Colorado Party seeks rejection of the FEC's vague and subjective standard.

A. The Colorado Party

The Colorado Party is an unincorporated political association funded primarily by individuals who support its promotion of the values and goals of the Republican Party and its platform. The Party has several interrelated missions: "to ensure that incumbent Congressmen from the state of Colorado are held accountable to their constituents; to freely engage in political speech and association . . . to promote the public good by advocating sound principles of, and high standards for, public governance; and to help elect Republican candidates for political office in the state of Colorado." J.A. 127. The Colorado Party has a vital political interest, apart from any particular election, in maintaining public understanding of the respective positions of the Republican and Democratic parties and in holding the Democratic Party accountable for the positions and actions of its leaders. J.A. 194-95.

Like any political party, the Colorado Party has long thought that an important part of its mission is identifying and discussing the positions elected officials from Colorado take in Washington on issues of national importance. J.A. 194-95.

B. FECA's Limitations on Party Activities

The Colorado Party conducts its affairs subject to FECA and applicable Colorado law. Accordingly, the Party may not accept annual contributions from individuals in excess of $5,000. § 441a(a)(1)(C). In addition, the Party may not accept contributions from corporations or unions, § 441b, and it does not receive funding from federal or state governments. The funds at the Party's disposal are thus among the most difficult to raise and most carefully expended in all of federal politics.

In terms of disclosure, all contributions received and all expenditures made by the Colorado Party in support of federal election activities are publicly disclosed, and transactions over $200 are itemized. § 434. Political activities in connection with Colorado state and local elections are subject to state law, which also imposes disclosure obligations. Col. Rev. Stat. Ann. §§ 1-45-108 & 1-45-110 (West 1990). The Colorado Party's federal contribution and expenditure disclosures are easily accessible to the public through the FEC's Public Disclosure Division and the Colorado Secretary of State. § 439; 11 C.F.R. §§ 105 & 108. These limitations, prohibitions and disclosures insulate the Colorado Party from any potentially corruptive influences.

In addition to these broad checks upon potential political corruption, § 441a(d) imposes strict monetary limits upon political party expenditures. Specifically, § 441a(d) prohibits a state party from spending more than $20,000 or two cents times the voting age population of the state,

whichever is greater, "in connection with" an election to the United States Senate.[4]

Prior to the 1986 election, the FEC determined that Colorado had a voting age population of 2,367,000. *See* FEC 12 *Record 4* at 1 (Apr. 1986). Therefore, the Colorado Party was forbidden from spending more than $103,248.54 "in connection with" the 1986 U.S. Senate race. *Id.* The political party spending limits in connection with U.S. Senate campaigns in 1986 ranged from as little as $43,620 in sparsely populated states to $851,680.50 in California. *Id.*[5]

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[4] This same formula applies to U.S. House elections in states with only one district. For other House districts, the limit imposed by § 441a(d) is $10,000.

Section 441a(d)'s two-cents-per-voting-age-population figure is adjusted each election cycle for inflation. § 441a(c). In 1986, the inflation-adjusted figure was approximately 4.4 cents. *See* FEC 12 *Record 4* at 1 (Apr. 1986). The 1994 figure was approximately 5.9 cents. *See* FEC 20 *Record 3* at 4 (Mar. 1994).

[5] Because of increases in the state's population and adjustments for inflation, the Colorado Party would have been permitted to spend up to $154,001 in 1994 had there been a Senate election in Colorado that year. The lowest limit in other states in 1994 was $58,600, while California parties were permitted to spend $1,325,415. Those figures will be adjusted again in 1996.

Although party spending limits are adjusted for inflation, the adjustments have not kept up with the extraordinary rise in the costs of political communication. For example, from 1988 to 1992 alone, the cost of a 30-second commercial during prime time in Atlanta increased by up to 33% with top slots costing up to $10,000. Lewis, "The 1992 Campaign: Campaign Finance; Clinton's Coalition Proves Effective at Raising Money," *New York Times*, Mar. 3, 1992, at A20. Broadcast costs in larger media markets increased at even a higher rate. *Id.* During the same time period, the average cost of bumper stickers rose from 11 cents to 30 cents each, a 173% increase. *Id.* By contrast, the Consumer Price Index rose 20% between 1988 and 1992. Comparing FEC 14 *Record 3* at 3 (Mar. 1988), with FEC 18 *Record 3* at 3 (Mar. 1992).

Many other groups dwarf political parties in the amount of money that they spend in connection with federal elections. For example, the AFL-CIO recently announced that it plans to spend

In 1986, as is the custom for many political parties, the Colorado Party chose to assign its $103,248.54 spending limit under § 441a(d) to the National Republican Senatorial Committee ("NRSC"). J.A. 96. State political parties may assign their expenditure limits to a national political committee. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) ("*DSCC*"). The Colorado Party assigned its limit out of a general belief that, because of the low amount of money it is permitted to spend and the high cost of communicating with the electorate, the most effective way to reach voters is to pool its money with the NRSC or the National Republican Congressional Committee, whichever is appropriate. J.A. 175. *See DSCC*, 454 U.S. at 42. ("Agency agreements may permit all party committees to benefit from fundraising, media expertise, and economies of scale. In turn, effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party.").

C. The Events of 1986

In the first half of 1986, Colorado Congressman Timothy E. Wirth[6] made several highly-publicized statements which blurred the distinction between the Democratic and Republican parties and, in the view of the Colorado Republican Party, misrepresented his public

---

$35 million on the upcoming 1996 U.S. House elections. Rosenblatt, "Labor to Pour Money Into Political Races," *Los Angeles Times*, Jan. 25, 1996, at A8 (Washington ed.). Similarly, the National Rifle Association's Institute for Legislative Action has an annual budget of $35 million, used primarily for independent political communication on gun control issues. Rezendes, "Clinton, NRA Find Battle Offers Mutual Benefits," *Boston Globe*, Oct. 15, 1995, at 1.

[6] Mr. Wirth was first elected to the U.S. House of Representatives in 1974, representing Colorado's Second Congressional District. *Politics in America: Members of Congress in Washington and at Home (1984)* at 234-35 ("*Politics in America*"). Congressman Wirth retained his Colorado House seat until 1986, when he ran for and won election to the United States Senate. He served one term in the Senate, declining to run for reelection. J.A. 196-97.

record. The Colorado Republican Party's response to these statements precipitated this case.

1. *Congressman Wirth's Public Advertising*

On January 16, 1986, Congressman Wirth filed his statement of candidacy for the U.S. Senate. J.A. 173-74. At that time, Mr. Wirth terminated his ongoing campaign committee for the 2nd Congressional District of Colorado,[7] "and all remaining funds [were] transferred to his designated campaign committee for election to the Senate." *Id.* at 173.

Shortly after announcing that he was running for the Senate, Congressman Wirth aired a series of television advertisements on defense spending and the national budget. Despite a consistent record of opposing increased defense spending, Mr. Wirth stated in one advertisement that " 'we need a strong defense . . . It's expensive, and we have to pay for it. I've been to the Soviet Union, and I've had enough dealing with the Soviets to understand how dangerous they are.' " Blake, "Wirth Walks Narrow Line on Defense Funds," *Rocky Mountain News*, May 11, 1986, at 15.[8] Regarding the budget, Congressman Wirth asserted in another paid advertisement that " '[c]utting the federal budget is our

[7] Mr. Wirth filed his statement of candidacy for reelection to his U.S. House seat on September 23, 1985 (on file at the Federal Election Commission).

[8] Prior to 1986, Congressman Wirth publicly contended that " '[i]t's absolutely criminal the amount of money this country is spending on defense.' " J.A. 168. Congressman Wirth repeatedly spoke out on the allegedly excessive amount of money the Reagan Administration was seeking for national defense. For example, Congressman Wirth was quoted as saying that "[e]ducation should be the best national defense . . . Defense Secretary Casper Weinberger 'never met a missile he didn't like or a toilet seat he couldn't afford.' " Anderson, "Wirth at CU to court student vote," Att. 5 to Exh. 11 of Defendants' Statement of Undisputed Facts.

Most of the cited newspaper articles from the 1980s were appended to Defendants' Statement of Undisputed Facts filed in the district court and thus are in the record of this case.

highest priority and greatest challenge.' " "GOP radio ads target Wirth's voting record," *Denver Post*, Apr. 8, 1986.

Congressman Wirth's public statements triggered a flurry of newspaper editorials debating his votes "against the MX missile, against aid to the anti-communist contras in Nicaragua and against increased aid to the budding democracy of El Salvador, but in favor of a nuclear freeze." "Rep. Tim Wirth on 'wings,' " *Colorado Springs Gazette Telegraph*, Mar. 18, 1986. The media frequently stressed that Colorado's congressional delegation was bitterly divided along party lines on national defense and security issues. "On Their Own," *Grand Junction Sentinel*, Mar. 21, 1986.

2. *The Colorado Party's Public Advertising*

Noting the incongruity between Congressman Wirth's advertisements and his voting record, the Colorado Party decided to sponsor its own advertisement campaign. The Party believed that Congressman Wirth was aggressively attempting to mislead Coloradans by claiming he had favored conservative Republican positions when, in fact, he had pursued liberal Democratic policies. "As the elected spokesman for 535,000 registered Republicans in Colorado, [the Colorado Party chairman felt he had] an obligation to defend Republican philosophy . . . [and] set the facts straight." J.A. 150.

Accordingly, the Colorado Party paid for three radio advertisements and two pamphlets between April 4 and May 30, 1986. The advertisements and pamphlets addressed Congressman Wirth's voting record and past public statements regarding his role in national defense and another controversial issue associated with Congressman Wirth, the AT&T divestiture.[9] All the ads called on

[9] Congressman Wirth chaired the U.S. House Subcommittee on Telecommunications. *Politics in America (1986)* at 240. ("As soon as he took over the [Telecommunications] subcommittee, Wirth began promoting efforts to deregulate the communications industry" in general, and AT&T in particular.) Throughout the early- and mid-1980s, the break-up of AT&T, the creation of regional Bell

Congressman Wirth to stop misrepresenting his official record. J.A. 92.

"Wirth Facts #1," a radio advertisement that aired between April 4 and April 13, 1986, stated in full:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

J.A. 161. The Colorado Party paid $15,000 to air Wirth Facts #1, and reported this payment in disclosure reports timely filed with the FEC. J.A. 93.

The Colorado Party sponsored two other radio spots and published two pamphlets addressing Congressman Wirth's public record which were similar to Wirth Facts #1. J.A. 162-72 . For example, "Wirth Facts # 3," likewise a radio spot, stated:

> Paid for by the Colorado Republican State Central Committee

---

operating companies, the rise in local telephone rates, and the imposition of access charges for local telephone calls were issues of intense debate both in Congress and in Colorado. For example, in early 1986, a prominent Denver columnist observed that "[e]veryone I have spoken with thinks that the AT&T divestiture has been a disaster, and that [Congressman Wirth] had a lot to do with it." Greenberg, "Tim Wirth in Catch-22 over image as phone company bad guy," *Denver Post*, Jan. 12, 1986. Other commentators observed that "the [AT&T] divestiture process has received enormous media attention" and "that [the] recent tumultuous changes in the telecommunications industry have caused frustration and confusion." Denvir, "Charges that Wirth broke up AT&T ring false," *Rocky Mountain News*, Jan. 26, 1986.

> There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R. 5158 gave "legislative sanction to divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking-up the phone company was a bad idea, but as far as we could tell that's what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts.

J.A. 163. The FEC has never disputed that the information communicated by the Colorado Party's advertisements and pamphlets was accurate, fair and important. J.A. 95.

In April 1986, Congressman Wirth had not yet become the Democratic Party's nominee for the U.S. Senate. The first of the advertisements was broadcast more than four months before the Democratic Primary, and the entire advertising campaign was completed more than two months before the primary. At this time, one other Democrat had announced that he was seeking the Democratic nomination and had purchased advertising time on a prominent Denver radio station. Blake, "Dark horse challenges Rep. Wirth," *Rocky Mountain News*, 1986. When the Colorado Party's advertisements aired, there was no way of knowing whether other qualified individuals would decide to seek the Democratic senatorial nomination. *See* Elections Calendar for 1985 and 1986, Att. 14 to Exh. 11 of Defendants' Statement of Undisputed Facts (indicating that prospective candidates had until June 27, 1986, to file primary entrance petitions). Indeed, several

prominent Democrats—including then-governor Richard Lamm and U.S. Rep. Patricia Schroder—were thought to be considering running. J.A. 201.

Likewise, the Republican nominee had not yet been determined when the Colorado Party sponsored the Wirth advertisements. At least three individuals were competing for the Republican nomination during April and May of 1986, and it was not until the Republican State Convention on June 7, 1986, that two of the candidates withdrew and Congressman Ken Kramer received the Convention's endorsement. J.A. 195-96. Mr. Kramer did not become his party's nominee until he won the Republican Primary on August 12, 1986, more than four full months after Wirth Facts # 1 aired.

In addition to holding Congressman Wirth accountable to his legislative record, airing the advertisements served other institutional goals of the Colorado Party, including spurring support and energizing party members. As the then-chair of the Colorado Party later testified,

> If you got a political party that is not seen as aggressively doing its job in holding the other party accountable, and when I saw discrepancies in Tim Wirth's statement[s] let me be sure that [a] large number of activists saw the same things and called me on the phone, and if the party was not responding to that, the fundraising would drop quickly.

J.A. 212.

3. *The Democratic Party's Retaliation*

The Party's advertisements and pamphlets generated significant political discussion. *See* Blake, "Wirth walks narrow line on defense funds," *Rocky Mountain News*, May 11, 1986. Stung, Congressman Wirth's campaign sent letters to many of the 30 radio stations which ran the spots, demanding that the stations provide him with equal response time. Obmascik, "Wirth, GOP renew feud on radio ads," *Denver Post*, Apr. 24, 1986, at 5B. At least one of the radio stations viewed Congressman

Wirth's demand as an attempt " 'to intimidate broadcasters from accepting political advertisements critical of Mr. Wirth's record.' " *Id.*[10]

After the Colorado Party's advertisements aired, Congressman Wirth decided to "run his TV ads for an extra 10 days." "GOP radio ads target Wirth's voting record," *Denver Post*, Apr. 8, 1986. He also broadcast radio spots satirizing the Colorado Party's political spots and vowed to match the Party's expenditures. Obmascik, "Fighting fire with fire: Wirth airs ad satirizing GOP's ads," *Denver Post*, May 10, 1986, at 5C. In an effort to blunt the impact of the Colorado Party's statements, Mr. Wirth spent an additional $35,000 on a newspaper and radio advertising campaign discussing his role in the AT&T breakup. Obmascik, "Wirth ads respond to GOP barbs," *Denver Post*, May 22, 1986.[11]

On June 12, 1986, two months before the Democratic senatorial Primary, the Colorado Democratic Party filed an administrative complaint against the Colorado Party with the FEC. The theory of the complaint was that the Colorado Party's expenses for the three radio advertisements and two pamphlets constituted "expenditure[s] in connection with the general election campaign" within the meaning of § 441a(d). Because the Colorado Party had assigned its expenditure limits to the NRSC, the complaint alleged that the expenditures violated the Act and sought the imposition of civil penalties. J.A. 83-84.

The complaint barely hid its partisan goals of stifling political debate. It asserted that the complaint "should

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[10] At the time, Congressman Wirth was Chairman of the Subcommittee on Telecommunications of the House Energy and Commerce Committee, which had jurisdiction over radio broadcasting legislation and regulation. 1986 Congressional Staff Directory 408 (Charles B. Brownson ed. 1986).

[11] Congressman Wirth's Campaign spent $3,787,202 on the 1986 U.S. Senate race. FEC Press Release at 22 (May 10, 1987). By contrast, the Colorado Party made $1,142,878 in disbursements during the entire 2-year 1985-86 election cycle. (Records on file with the FEC)

operate as notice that [the Party's] spending is accountable under § 441a(d)," and that "*any* [future] spending by the Republican Committee in defiance of those limits will be viewed by complainant as a knowing and willful violation of the FECA requiring FEC referral to the Justice Department." J.A. 83 (emphasis in original). It also noted the Democratic Party's resolve to "pursue this matter fully in cooperation with the FEC." *Id.*

D. FEC Prosecution of the Colorado Party

On November 5, 1986, by a vote of 5-1, the FEC found "reason to believe" that the cost of Wirth Facts #1 was an expenditure "in connection with the general election" and, therefore, caused the Colorado Party to exceed its expenditure limits. J.A. 136-37. However, the FEC dismissed the allegations regarding the Party's other two radio advertisements and the two pamphlets on a 3-3 deadlock vote. *Id.*[12] Almost two years later, the FEC found "probable cause to believe" that the Colorado Party had violated FECA. The FEC proposed a conciliation agreement which would have required the Party to admit guilt and pay a $4,000 civil penalty. J.A. 139. At no time did the FEC explain why the costs for Wirth Facts #1 were subject to § 441a(d)'s expenditure limits and the costs of the other advertisements were not.[13]

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[12] The FEC needs the votes of four commissioners to proceed. *See* § 437c(C).

[13] The Colorado Party is not the only political party that the Commission has prosecuted for allegedly violating § 441a(d) and/or its related reporting requirements. Indeed, in recent years, the FEC has prosecuted and levied civil penalties against at least three other political parties in the following Matters Under Review ("MUR" is the FEC's designation for an administrative enforcement proceeding):

- MUR 3524 (1993)—The Oregon Republican Party admitted guilt and paid a $10,000 civil penalty for failing to properly report expenditures for: (1) a newspaper advertisement published two months before the U.S. Senate primary and seven months before the general election criticizing then-Rep. AuCoin, a declared Senate candidate, for bouncing checks at the House bank; and (2) broadcasting a radio spot one week before the senatorial primary on the same subject.
- MUR 3009 (1990)—The Rhode Island Democratic Party admitted guilt and paid a $1,200 civil penalty for exceeding its spending limits by paying for a newspaper advertisement and purchasing posters for a rally.
- MUR 2983 (1990)—The Illinois Democratic Party admitted guilt and paid a $9,000 civil penalty for exceeding its spending limit by publishing a statewide "Get-out-the-Vote" brochure.

The conciliation agreements between the FEC and the parties are public documents. Petitioners have lodged with the Court copies of the conciliation agreements in the cited MURs.

E. The District Court Proceedings

When the Colorado Party declined to admit guilt and pay a civil penalty, the FEC filed a *de novo* civil action in the United States District Court for the District of Colorado, contending that the expenditures to air Wirth Facts #1 violated § 441a(d). The Commission argued that § 441a(d) applies to any advertisement that contains an "electioneering message" about a "clearly identified candidate," and that Wirth Facts #1 met these criteria. The FEC also contended that the Party's financial reports, although they disclosed its expenditure payments, did not properly classify the expenditures for Wirth Facts #1, in violation of FECA. The Commission sought a civil penalty of $45,000 and a permanent injunction barring the Party from exceeding its expenditure limit in the future. J.A. 57.

The Colorado Party denied that Wirth Facts #1 was an expenditure "in connection with" a general election, noting that it did not "expressly advocate" the election or defeat of a particular candidate. J.A. 61. The Party also counterclaimed, seeking a declaratory judgment that § 441a(d) unconstitutionally restricts the Party's First Amendment rights of free speech and association. *Id.*

During discovery, the Commission refused to state why Wirth Facts #1 was subject to § 441a(d)'s expenditure limitations while the Colorado Party's other advertise-

ments were not. J.A. 97 (stating that "the Federal Election Commission made no finding distinguishing Wirth Facts #1 from any other advertisements"); *see also* J.A. 108. The FEC also refused to identify any particular language in Wirth Facts #1 that conveyed an "electioneering message." J.A. 97 (acknowledging that "[n]o Statements of Reasons were issued by any of the Commissioners explaining any of their votes" relating to the Colorado Party). *See also* J.A. 152.[14]

The FEC claimed that it was not legally required to offer any distinction between the Colorado Party's political advertisements, asserting that "the Commission, like any other agency with law enforcement responsibilities, may exercise [] prosecutorial discretion as it or its members deem appropriate." J.A. 108. The FEC also declined to recognize any period of time during Congressman Wirth's entire term of office in which the Colorado Party could have sponsored Wirth Facts #1 without being subjected to § 441a(d)'s expenditure limitations. J.A. 157 ("[N]either the [FECA] nor the Commission's regulations establish any specific cut-off dates. . . .").

Throughout its prosecution of the Colorado Party, the FEC—in both the agency proceedings and in its subsequent civil suit in district court—aggressively sought to discover sensitive information about the Party's internal workings, political strategies, and subjective intent. The FEC was particularly aggressive in seeking information about the Party's rationale for airing Wirth Facts #1.

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[14] The only effort the FEC made to distinguish between the advertisements was the following delphic statement made in response to an interrogatory.

> [C]ounsel for the Commission notes that although the [FEC] Commissioners issued no statements of reasons for their different votes, it *appears* that they voted against finding reason to believe with respect to the other advertisements *primarily* because they *believed* those messages contained no electioneering message.

J.A. 152-53 (emphasis added).

For example, the FEC proffered the following interrogatories to the Colorado Party:

- State the purposes for which the [Colorado Party] was established, and identify all documents and records that evidence, set forth, or describe those purposes. J.A. 131.
- Identify the person or persons who appoint the chairman of the [Colorado Party]. J.A. 133.
- Identify the person who made the decision, or who participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1." J.A. 132.
- State the purposes for which "Wirth Facts #1" was produced and aired. Identify all records and documents, including, but not limited to, internal memoranda, letters, and minutes of meetings, that evidence, set forth, or describe those purposes. J.A. 132.
- Identify all persons who decided, or participated in the process of deciding, which candidates for federal office the [Colorado Party] would support in 1986. J.A. 134.

In addition, Commission lawyers interrogated the former chairman of the Colorado Party in a sworn deposition and sought answers to the following questions:

- Can you summarize some of your political involvement over the last 20 years or so? J.A. 189.
- What was your involvement in planning campaign strategy? J.A. 195.
- How did the decision to put out [Wirth Facts #1] come about? J.A. 200.
- Who attended the [Colorado Party's] meetings at which [Congressman] Wirth was discussed? J.A. 204.
- Did [the Colorado Party] have an attorney review this script [for Wirth Facts #1 and other adver-

tisements] before putting [them] on the air? J.A. 207.

As noted above, Wirth Facts #1 was aired four months before the Democratic Party chose its nominee for the Colorado Senate seat. Remarkably, the FEC proceeded under the extraordinary presumption that Congressman Wirth was certain to be the Democratic nominee and that the Colorado Party knew this in April 1986 when it aired Wirth Facts #1. J.A. 118.

At the conclusion of discovery, the Colorado Party and the FEC each moved for summary judgment. The district court, three years later and after Mr. Wirth completed his single six-year Senate term, granted summary judgment for the Party. Relying on this Court's precedent construing the term "in connection with" under FECA, the district court ruled that: (1) § 441a(d) limits only expenditures for "express advocacy"; and (2) Wirth Facts #1 did not expressly advocate the election or defeat of any candidate. J.A. 28, 30. The district court, *sua sponte*, dismissed as "moot" the Colorado Party's constitutional challenge to § 441a(d). J.A. 31.

F. The Court of Appeals Decision

The Colorado Party appealed the district court's dismissal of its counterclaim, and the Commission cross-appealed for a ruling that the Party had violated § 441a(d). The FEC did not appeal the district court's finding of fact that Wirth Facts #1 did not constitute express advocacy. *See* Opening Appeals Brief for the Federal Election Commission at 20 n.4.

A panel of the United States Court of Appeals for the Tenth Circuit reversed and remanded, instructing the district court to enter judgment in favor of the FEC and to determine an appropriate civil penalty.

Deferring to its understanding of two of three FEC advisory opinions, the panel held that § 441a(d)'s expenditure limitations apply to any political party spending

that "involves a clearly identified candidate and an electioneering message, without regard to whether that message constitutes express advocacy." J.A. 43-44.

The panel also ruled that Wirth Facts #1 was "in connection with" a general election because it was directed at a clearly identified candidate, Congressman Wirth, and contained an electioneering message. J.A. 44-46. The panel based this ruling on its view that a reasonable person would think that Wirth Facts #1 tended to "diminish" public support for Congressman Wirth and to "garner support" for "the unnamed [and unselected] Republican nominee." J.A. 45. The panel was silent on how Wirth Facts #1 differed from the Colorado Party's other radio advertisements and pamphlets, which the FEC had determined were not limited by § 441a(d)'s spending limits.

Finally, the court of appeals rejected on the merits the Colorado Party's First Amendment challenge to § 441a(d). J.A. 46-48. With no evidence that § 441a(d)'s expenditure limits are necessary to prevent political parties from being corrupting agents, the panel upheld the constitutionality of the spending limits because the restrictions " 'equalize the relative ability of all citizens to affect the outcome of elections' " and help "cap campaign costs and increase accessibility to our political system." J.A. 48. Inexplicably, the panel relied on *Buckley* for that holding, despite the fact that this Court in *Buckley* expressly rejected those grounds for limiting political contributions or expenditures.

The court of appeals also noted that the "primary purpose" of the Act's other contribution and expenditure caps—presumably including those expenditure limits ruled unconstitutional by this Court—is to "prevent corruption or the appearance of corruption." J.A. 46. The panel continued, "[t]he same reasoning the Supreme Court [has] used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political parties."

J.A. 47.[15] Despite the FEC's failure to produce any evidence that state political parties corrupt candidates for federal office—and the Colorado Party's production of affirmative evidence to the contrary—the court of appeals, without legal citation or any factual foundation, concluded:

> [P]arty expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures.

J.A. 47. Thus, the court of appeals effectively shifted the burden of proof to the Party to explain why parties cannot be corruptive.

On August 7, 1995, the Colorado Party filed a suggestion for rehearing *en banc*. On September 6, 1995, the court of appeals denied the Party's suggestion, with Judges Baldock, Ebel and Kelly voting for rehearing and Judge Lucero recused. J.A. 49-50. On September 21, 1995, the Colorado Party filed a petition for a writ of certiorari. This Court granted the Colorado Party's petition on January 5, 1996. 64 U.S.L.W. 3447.

SUMMARY OF ARGUMENT

1. Section 441a(d) violates the First Amendment of the Constitution because it unjustifiably limits the amount of political expression that political parties may undertake. The Colorado Party's use of publicly disclosed, voluntarily donated and legally restricted funds to finance political advertising is a quintessential exercise of political speech and association protected by the First Amendment.

Buckley v. Valeo and its progeny establish that the government bears a heavy burden when it seeks to limit expenditures for political speech. To uphold § 441a(d),

[15] Like the district court, the court of appeals concluded that Wirth Facts #1 did not constitute "express advocacy." J.A. 44 n.10.

the government must prove that the limitation is necessary to achieve a compelling governmental interest and is narrowly tailored to that interest. In addition, the government must establish that the recited harms are real, and that the statute will alleviate the harms in a direct and material way.

The government's burden is particularly heavy here because the legislatively manifested reason for § 441a(d) is not to prevent corruption or the appearance of corruption but to cap campaign-related spending and equalize speech. These latter justifications were held constitutionally illegitimate in *Buckley*. The government's burden also is very high because § 441a(d) places extreme limits on political party speech. The statute makes it impossible for the Colorado Party to send a single letter to every voting age citizen in the state.

The government has not and cannot meet its burden regarding § 441a(d) The government has offered literally no evidence that § 441a(d) was intended to prevent actual corruption or the appearance of corruption, or that it does or could serve those purposes. In fact, § 441a(d) does not serve any anti-corruption purpose because (i) other provisions of FECA insulate the parties from corruptive influences, and (ii) any effect the parties may have on candidates constitutes democracy, not corruption.

The FEC's attempt to relabel § 441a(d) as a "contribution" limit does not avoid the First Amendment violation. *Buckley* gave less protection to contributions then to expenditures because contributions are merely general expressions of support for a candidate and his views and do not communicate the underlying basis of support. Section 441a(d), however, targets specific expressions of party views—pure speech. *Buckley* also stressed that contributors may engage in unlimited independent speech. Unlike individuals and every other political association, political parties are stringently limited by § 441a(d) in what they can say in connection with an election.

2. The FEC's interpretation of § 441a(d) is vague and violates the First Amendment. This Court's decisions in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), established an objective bright-line test: "express advocacy." Instead of adopting the "express advocacy" standard, which has explicit meaning, the FEC instead interprets § 441a(d) to apply to any party speech that contains an "electioneering message." That "standard" is ill-defined, open-ended and subjective. It requires *post-hoc* analysis by the FEC, which intrusively investigates alleged violations of § 441a(d) by examining the subjective intent of the speaker and the subjective interpretation of the audience. Indeed, the FEC even seeks to reinterpret "express advocacy" to encompass implied advocacy, distorting this Court's holdings and creating unconstitutional vagueness.

3. Properly interpreted, § 441a(d) limits spending by political parties only if the speech contains words that expressly advocate the election or defeat of a clearly identified candidate. The FEC's "electioneering message" standard is unworthy of deference because it raises substantial constitutional concerns. Moreover, traditional tools of statutory construction, including the presumption that the same words in the same statute have the same meaning, clearly establish that § 441a(d) limits only express advocacy, thus eliminating any ambiguity for the FEC to resolve. The FEC's interpretation of § 441a(d) is further undeserving of deference because it is based on inconsistent, unreasoned Advisory Opinions and because FECA itself forbids the FEC to establish any rule of law except through rulemaking procedures not followed here.

ARGUMENT

I. SECTION 441a(d)'S STRINGENT LIMIT ON THE ABILITY OF POLITICAL PARTIES TO SUPPORT OR OPPOSE POLITICAL CANDIDATES VIOLATES THE FIRST AMENDMENT.

No previously challenged FECA expenditure limitation imposed upon individuals, political associations or non-business entities has survived First Amendment scrutiny in this Court. *See Buckley*, 424 U.S. at 59 n.67 (striking restrictions upon (1) the expenditure of personal funds by candidates for federal office, (2) the expenditure of more than $1,000 in personal funds by other individuals, and (3) the expenditure of more than a set amount of campaign funds by candidates for federal office); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497-501 (1985) ("*NCPAC*") (striking restriction upon independent expenditures by PACs); *FEC v. Massachusetts Citizen for Life, Inc.*, 479 U.S. 238, 268 (1985) ("*MCFL*") (striking restrictions upon independent expenditures by incorporated political associations).

The stringent limit imposed by § 441a(d) on the ability of political parties to speak out in support of their own candidates is at least as offensive to the First Amendment as these other limitations and merits a similar fate. It is unthinkable that the Colorado Party should be prohibited from sending so much as a single letter to each voter registered for the 1986 Senate election or, indeed, to each of its own members in connection with a federal election. However, this is precisely the effect of this statute.

No First Amendment challenge to § 441a(d) was presented in *Buckley*. This Court, however, perceived the First Amendment issue and made clear that the issue survived the Court's disposition of a Fifth Amendment claim. 424 U.S. at 58 n.66. The Colorado Party is ready, willing and able to make expenditures expressly advocating the election or defeat of candidates for federal office that would exceed the limits imposed by

§ 441a(d), but it has been deterred from doing so by the obvious and credible threat of FEC enforcement actions. *See* J.A. 68. The reality of this threat is confirmed by this case, in which the Colorado Party finds itself under attack even though it sought to comply with § 441a(d).

Because § 441a(d) unjustifiably cuts off vital political speech, it is void. The statute violates the First Amendment, no matter how narrowly "in connection with" may be construed.

A. Section 441a(d) Infringes Upon Core First Amendment Freedoms of Speech and Association.

By forbidding state parties from spending more than pennies-per-voter "in connection with" a general election, § 441a(d) strikes at freedoms at the heart of our democratic process. The First Amendment safeguards our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). It assures an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Thus it "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

Limiting the funds that a party can spend on political speech is no different than limiting political speech itself. *See Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990). As this Court held in *Buckley*,

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Buckley, id. at 19. "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* n.18. Thus, § 441a(d) must stand or fall as a direct limitation on the core First Amendment right to engage in political speech.

In addition to restricting speech, § 441a(d) also infringes upon the freedom of association guaranteed by the First Amendment. *Id.* at 23. The right to associate with the political party of one's choice is "an integral part" of the First Amendment. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). Elections are "the critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (quoting *Tashjian*, 479 U.S. at 216). Therefore, limitations upon public debate are "particularly egregious where the state censors the political speech a political party shares with its members." *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring)). Indeed, the freedoms of speech and association in this context are mutually dependent, for the "pooling" of contributions is "often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley*, 424 U.S. at 65-66; *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) ("The two rights overlap and blend. . . .").

Section 441a(d) impairs associational rights in at least two ways. First, party members are restricted in their joint speech to the public at large. Even more egregiously, the limits are so low that parties cannot even communicate freely with their own members, a right FECA allows even to corporations, unions, and PACs, as well as other political organizations. *See* § 431(9)(B)(iii).

B. Section 441a(d) Is Void Unless the Government Proves That the Restriction Is Necessary to Achieve a Compelling State Interest and Is Narrowly Tailored to That Interest.

Because § 441a(d) so clearly infringes upon core First Amendment freedoms of speech and association, it may be upheld only if the government proves that the restriction is necessary to achieve a compelling state interest and that the restriction is narrowly tailored to that interest. *MCFL*, 479 U.S. at 263. Such strict scrutiny requires the production of rigorous and exacting proof.

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must *demonstrate* that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1017 (1995) (emphasis added) (quoting *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994)); *see also NCPAC*, 470 U.S. at 499 ("A tendency to demonstrate distrust of PACs is not sufficient.").

C. The Government's Burden of Justifying § 441a(d) Is Particularly High.

Several considerations require that the government's defense of § 441a(d) be held to a particularly high standard of proof.

1. *Section 441a(d) Was Enacted for the Unconstitutional Purposes of Reducing and Equalizing Speech.*

FECA's legislative history makes clear that campaign spending limitations were intended to reduce the overall level of political spending and to equalize the strength

of political voices, including those of political parties.[16] The only significant treatment of party spending limits was in the legislative history of the 1974 Amendments to FECA that enacted § 441a(d). Pub. L. 93-443, 88 Stat. 1265-66 (1974). That congressional debate occurred in connection with Senate amendments 1102 and 1152, which removed and then reinstated § 441a(d) into the bill. *See* 120 Cong. Rec. S5411-15 (daily ed. Apr. 8, 1974) (statements of Senators Clark, Brock and Cannon). These debates make clear that § 441a(d)'s limits were enacted in order to close a perceived "loophole" in the other campaign spending limitations imposed on campaigns, which were subsequently declared unconstitutional in *Buckley*. Thus § 441a(d) is the product of the constitutionally suspect congressional goals of reducing and equalizing speech. Indeed, the court of appeals relied on these purposes to sustain § 441a(d). *See* J.A. 222-24.

These objectives, however, are flatly unconstitutional. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57. Since § 441a(d) was expressly adopted for an unconstitutional purpose, any other proffered justifications must be met with deep skepticism.

2. *Section 441a(d) Places Extraordinary Burdens Upon Speech by Political Parties.*

The government's burden also is very high because of the severity of the restrictions on core First Amendment activity imposed by § 441a(d). *See Buckley*, 424 U.S. at 19-21 (recognizing that the level of scrutiny is affected by the magnitude of the burden upon First Amendment rights). Section 441a(d) prohibits the Colorado Party from spending more than pennies-per-potential-voter in the state. This sum is far less than the cost of first class

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[16] *See Buckley*, 424 U.S. at 25-26; H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 6 (1974); 120 Cong. Rec. S4460-61 (daily ed. March 26, 1974) (statements of Senators Clark and Hathaway); 120 Cong. Rec. S5539 (daily ed. Apr. 9, 1974) (statement of Senator Taft).

postage necessary to send one letter to every voter in the state (not including the costs of designing, sorting, stuffing, addressing and printing those letters). In this respect § 441a(d) effectively insulates incumbents from criticism by an opposing party. While parties are restricted by federal law from supporting or opposing candidates for federal election, incumbents (like then-Congressman Wirth), through their franking privileges, are able to communicate to voters with a government subsidy. *See* 39 U.S.C. § 3210 (1994).

The limitations imposed by FECA also infringe upon a political party's ability to attract new voters to its causes and candidates, as well as upon its ability to communicate with its own members. By not permitting the Party to pay the cost of first class postage for one mailing to every party member in the state, § 441a(d) infringes upon the Party's constitutional right to communicate with its members. *Cf. Eu*, 489 U.S. at 224. Ironically, corporations, PACs, political organizations and unions are able to communicate to their members as much as they desire without any spending limit. *See* § 431(9)(B)(iii). Such disparate treatment is perverse and unconstitutional.

D. The Government Has Not Met Its Heavy Burden.

1. *The Government Has Offered Literally No Evidence That § 441a(d) Is Necessary to Achieve a Compelling State Interest.*

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97. Despite repeated challenges by the Colorado Party and the requirement of Federal Rule of Civil Procedure 56 that the government submit whatever evidence it intended to rely upon, *the government offered literally no evidence that the limitations imposed by § 441a(d) are necessary to achieve this compelling governmental interest.*[17] In fact,

[17] In moving the district court for summary judgment, the Commission first noted the statement in *Buckley* that large contributions given to secure *quid pro quo*'s may undermine the integrity of our political system. It then continued,

> Defendants have pointed to no reason why contributions in the form of coordinated expenditures by state political parties pose no similar risks. Certainly a *quid pro quo* owed by an elected official to a state party official is no less corrupting than one owed to any other individual. . . . Defendants have presented no circumstances or justification which would give them a constitutional right to purchase extra influence over elected officials.

Plaintiff's Reply Memorandum in Support of Its Motion for Summary Judgment, at 5-6. This argument erroneously equates political parties—which are broad-based groups of like-minded individuals—with narrow, wealth-generating interests.

Before the court of appeals, the Commission first argued that it did not have to present evidence of corruption, then noted historical examples of party corruption. *See* Opening Appeals Brief for the Federal Election Commission at 26-27. As noted in footnote 20, *infra*, these examples are wholly irrelevant to *modern* political parties.

the Commission has stated during this litigation that it made "no findings or allegations concerning the appearance of corruption." J.A. 111. This failure of proof, in itself, is fatal to any defense of §441a(d).

Further, the government has identified no congressional findings—or even suggestions—in the legislative history of FECA that political parties are a corruptive influence on candidates. To the contrary, the legislative history of FECA reflects a very positive view of political parties and their place in American politics. *See, e.g.*, S. Rep. No. 689, 93d Cong., 2d Sess. 7-8, 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5593-94 & 5601. Indeed, the government's *inferred* anti-corruption legislative purpose is refuted by the *express* reasons for § 441a(d), which were to uphold FECA's constitutionally disfavored goals of equalizing resources and capping campaign spending. Thus, the government has done no more than "posit the existence of the disease sought to be cured," an insufficient showing to meet constitutional muster. *See National Treasury Employees Union*, 115 S. Ct. at 1017 (quoting *Turner Broadcasting System*, 114 S. Ct. at 2450).

2. *In Fact, § 441a(d) Is Not Necessary to Prevent Corruption or the Appearance of Corruption.*

The government has been unable to prove that a limitation upon party expenditures is necessary to prevent corruption because modern political parties do not "corrupt" elected officials. When parties engage in political expression, they are nothing more than groups of individuals who have combined their legally restricted resources in order to maximize the impact of their individual voices. Such "pooling" is at the core of First Amendment protection. *See Buckley*, 424 U.S. at 65-66. Any effect that political parties might have on candidates through their speech and associational activities is "democracy," not "corruption." *See NCPAC*, 470 U.S. at 498.

A modern political party has no reason to corrupt public officials for an economic benefit. Parties themselves do not generate wealth from commercial activities or possess independent economic interests. Indeed they are prohibited from using commercial means to finance their political activities.[18] Moreover, the stringent limit on sources of party funds and the comprehensive requirements of public disclosure prevent any theoretical use of parties as a conduit for corruptive payments.

The sorts of patronage practices which brought economic benefit to parties and their members are relics of a different era, which predates FECA by almost a century. Civil service laws and laws regulating government procurement, a free investigative press, direct primaries and the rise of candidate-centered politics, among other factors, have taken away the spoils system which characterized nineteenth century party politics.[19] It is no

[18] The sale of any items by a party are subject to the definition of "contribution." *See* 11 C.F.R. § 100.7(a)(2). Thus, even purchases of buttons or other campaign paraphernalia from a party are subject to contribution limits, must be disclosed, and may not be made by prohibited sources such as corporations or unions.

[19] *See, e.g.*, James L. Sundquist, *Party Decay and the Capacity to Govern, in The Future of American Political Parties* 47-49 (Joel L. Fleishman ed. 1982); *see also* Frank J. Sorauf & Scott A. Wilson,

accident, therefore, that the only "proof" of corruption that the FEC has offered during this entire litigation has been from such bygone eras.[20]

Nor can party expenditures be equated with the types of "corruption" that may be attributed to the effects of corporate or union wealth. Because political parties are "formed for the express purpose of promoting political ideas and cannot engage in business activities," their "political resources reflect political support." *MCFL*, 479 U.S. at 264; *Austin*, 494 U.S. at 662 (quoting *MCFL* at 264). In this respect, parties are quite different from corporations, which have the capability to convert their success in the economic marketplace into a voice amplified beyond its actual political support. In fact, political parties are much further removed from potential corruption than are corporate and union PACs, which are free to make unlimited independent expenditures in

Campaigns and Money: A Changing Role for the Political Parties?, in The Parties Respond 198-99 (L. Sandy Maisel ed. 1990); Gary R. Orren, *The Changing Styles of American Party Politics, in The Future of American Poliitcal Parties* 32 (Joel L. Fleishman ed. 1982).

[20] In its opening brief to the court of appeals, the FEC listed "such notorious examples of corrupt political organizations as Boss Tweed and the Tammany Hall machine, the 1876 Tilden/Hayes presidential election, the Custom House scandals of the 1880's, Teapot Dome, the Pendergast Machine, and Watergate." *See* Opening Appeals Brief for the Federal Election Commission at 27 n.6. This was the *first and only* occasion during the more than ten years of this litigation that the Commission has identified any support for its view that political parties can be corruptive.

The only modern example of purported party corruption cited by the FEC is the Watergate scandal, which in fact supports Petitioners' position that political parties reduce corruption by limiting candidate dependence upon special interests. The abuses of the 1972 Nixon campaign involved money flowing to the Committee to Reelect the President, and did not implicate the Republican Party, its Chairman, or other party officials. *See* U.S. Dept. of Justice, *Watergate Special Prosecution Force Report* (Oct. 1975); S. Rep. No. 981, 93d Cong., 2d Sess. 18-20 (1974) (Senate Watergate Committee Report).

spite of the fact that they are organized around the sponsoring corporation's or union's specific economic interests and can rely upon corporate and union wealth for general operating expenses. *See* § 441b; 11 C.F.R. Part 114. Therefore, the government has far less justification for infringing upon the First Amendment rights of political parties.

Any other theory of political party "corruption" assumes two levels of corruption: (1) that other interests will corrupt parties, and (2) that the parties will then corrupt elected officials. However, such indirect corruption is totally implausible. FECA already imposes significant checks upon potential corruption of the parties themselves. Like candidates and PACs, parties are subject to contribution limits, may not receive corporate or union contributions, and must report to the FEC all contributions and expenditures, making it extremely difficult to corrupt the parties. *See* Statement of the Case § B, *supra*. As this Court explained in *Buckley*,

> The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [then] § 608(c)'s campaign expenditure ceilings.

424 U.S. at 55.

Unlike corporations, unions and their PACs, political parties represent an extraordinarily broad range of interests. As such, the parties are not captive to narrow economic interests which are often viewed as corruptive. Moreover, because American political parties necessarily focus upon building majorities, they are unwilling to make financial support contingent upon a candidate's position on any one particular issue.[21] Therefore,

[21] *See, e.g.*, David E. Adamany, *Political Parties in the 1980's, in Money & Politics in the United States* 112 (Michael J. Malbin ed. 1984) ("It would be difficult under any but the most extreme circumstances for a party to refuse resources to a party incumbent, despite his independence on many policy issues. A congressman of the opposition party, elected because the party had withdrawn support from the incumbent, would certainly not be more congenial on policy. And his vote would be assured to help the opposition party organize the chamber, dominate committee action, and support the opposition leadership on procedural and rules votes."); Gary R. Orren, *The Changing Styles of American Party Politics, in The Future of American Political Parties* 26 (Joel L. Fleishman ed. 1982) ("[T]he party will be reluctant to punish uncooperative members and thus threaten their own margins in Congress.").

> As a source of campaign funds, American parties probably constitute the cleanest money in politics. They derive funds from individuals and organized interests. But their mix of sources is more diverse than that of any other major organization. As a result, parties are relatively free of special-interest influence. A candidate's integrity is seldom threatened in accepting party funds for a campaign. Parties are probably the least demanding mistress in politics. Normally, the parties' main expectation of candidates is that they will run effective campaigns and that when elected they will support the party position when their constituency and conscience permit it.[22]

Far from preventing the appearance of political corruption, § 441a(d) fosters it by reducing the role of broad-based parties and expanding the influence of narrow interest PACs.[23] Unshackling political parties would "re-

[22] John F. Bibby, *Campaign Finance Reform: Expanding Government's Role or the Parties' Role?*, Commonsense 1, 10 (Dec. 1983) ("A more promising avenue of reform would be encouraging a larger role for the political parties in campaign finance."); *see also* Herbert E. Alexander, *Financing Politics* 172 (4th ed. 1993) ("FECA could be amended in ways that would strengthen the parties . . . including, first, the elimination of limits on party committee spending on behalf of candidates."); Larry J. Sabato, *The Party's Just Begun* 223 (1988) ("The less party money there is available, the more candidates will have to rely upon PAC money; the more resources the parties can share with their nominees, the less officeholders will be indebted to special interest groups.").

[23] Unlike political parties, PACs have had a marked tendency to favor incumbents with their contributions. For instance, the 349 House incumbents running in the 1992 general election received more than $89 million from PACs, while the 314 challengers re-

duce[] the candidate's dependence on outside . . . coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." *Buckley*, 424 U.S. at 53 (footnote omitted).

E. The Government's Attempts to Portray Party Expenditure Limits as Contribution Limits Are Unavailing.

As explained above, the long line of this Court's decisions interpreting FECA and other campaign finance laws makes clear that this limitation upon party expenditures, like the limitations upon expenditures by individuals, candidates, PACs and other political organizations, is unconstitutional. Recognizing the reasoning in those decisions that limitations on the amount of political contributions are less burdensome, and hence of comparably less constitutional significance, than limitations on political expenditures, the government has repeatedly argued that the expenditures at issue here should be treated as contributions. *See, e.g., Buckley*, 424 U.S. at 20-21. However, the government's position on this point is untenable.

Based upon its plain meaning, § 441a(d) explicitly prohibits the parties from making any "expenditure" in excess

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ceived less than $11 million. Jamin Raskin & John Bonifaz, "The Constitutional Imperative and Practical Superiority of Democratically Financed Elections," 94 Colum. L. Rev. 1160, 1176 (1994). Even in 1994, a year in which challengers were unusually successful at the ballot box, PACs gave more than $137 million to incumbent Senators and Representatives, while giving less than $19 million to challengers. FEC Press Release at 3 (Mar. 31, 1995). The disparity in PAC contributions is particularly dramatic between incumbents in the majority and challengers in the minority. For example, in 1988 Democratic incumbents in the House received almost 25 times more money from PACs than did Republican challengers. David B. Magleby & Candice J. Nelson, *The Money Chase: Congressional Campaign Finance Reform* 81-84 (1990). In contrast, the two major political parties contributed $1,812,757 to House and Senate challengers in the 1986 election, while contributing $1,949,821 to incumbents. FEC Press Release at 3 (May 10, 1987). *See generally* Lillian R. BeVier, "Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform," 73 Cal. L. Rev. 1045 (1985).

of the statutory formula. In apparent recognition of this fact, this Court in *Buckley* specifically included the limit upon party spending in a list of challenged sections of FECA which were "expenditure" limitations. 424 U.S. at 39. That FEC regulations treat all party expenditures as "coordinated," *see* 11 C.F.R. § 110.7(b)(4), cannot alter this result, for the distinction is one of constitutional origin completely unaffected by agency action.

More fundamentally, regardless of whether the label "expenditure" or "contribution" is attached to the party's speech, the nature of the party conduct being restricted makes clear that the same protections must be afforded here as were afforded to the expenditures in *Buckley*, *MCFL*, and *NCPAC*. The Court explained in *Buckley* that a contribution warrants less constitutional protection than an expenditure in part because it "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 21. But Wirth Facts #1, like expenditures on speech made by candidates, individuals, PACs, and other political organizations, communicated exactly the basis for the Party's view, namely that Congressman Wirth had not been forthcoming with Colorado voters. Thus, the Colorado Party's advertising expenditures were not mere "proxy speech" like contributions, and they deserve the same protection as other direct political speech.

The other rationale for the constitutional distinction between expenditures and contributions also leads to the inescapable conclusion that § 441a(d) must be judged—and struck down—as an expenditure limit. *Buckley* noted that a contribution limit is less burdensome because it "involves little direct restraint on . . . political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe upon the contributor's freedom to discuss candidates and issues." *Id.* at 21. But political parties, unlike all other political entities, are prohibited by FECA from making unlimited independent expenditures. *See* 11

C.F.R. § 110.7(b)(4). That prohibition, combined with § 441a(d)'s spending limits, precludes parties from publicizing their views. Thus, § 441a(d) has the same debilitating effects on the political parties as the prior limits which were struck down by this Court had on spending by candidates, individuals, and other political organizations, and must meet the same fate.

* * * *

Section 441a(d) limits political speech which is not corruptive and does not have the appearance of corruption. The government has not offered any evidence which would justify restricting this core First Amendment activity. Therefore, § 441a(d) must be declared unconstitutional.

II. THE FEC'S "ELECTIONEERING MESSAGE" STANDARD AND ITS INTERPRETATION OF THIS COURT'S "EXPRESS ADVOCACY" TEST ARE UNCONSTITUTIONALLY VAGUE.

In addition to imposing an unjustified burden on core First Amendment political speech, the "in connection with" language of § 441a(d) does not provide the clear and precise guidance that the Constitution requires. The FEC does not dispute this point, but contends that the "electioneering message" standard adopted by the court of appeals cures any vagueness problems. In fact, if § 441a(d) is construed to adopt the "electioneering message" standard, it is void for vagueness.

A. Vagueness Concerns Are Most Acute When Statutes Imperil the Free Exercise of Fundamental First Amendment Rights.

Where First Amendment rights are affected, "[p]recision of regulation must be the touchstone." *Edenfield v. Fane*, 113 S. Ct. 1792, 1803-04 (1993). Unless regulations are drafted with "narrow specificity," protected activity will be deterred as speakers "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41

n.48 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).[24]

B. Only if § 441a(d) Is Limited to "Express Advocacy" as Articulated by This Court in *Buckley* and *MCFL* Can Constitutional Vagueness Concerns Possibly Be Overcome.

The court of appeals in *Buckley* sought to cure the vagueness of portions of FECA through a narrowing construction resulting in a standard requiring " 'advocating the election or defeat of' a candidate." *Buckley v. Valeo*, 519 F.2d 821, 853 (D.C. Cir. 1975). This Court reversed, holding that greater precision and clarity were required to avoid unconstitutional vagueness. *Buckley*, 424 U.S. at 42. The Court held that at the very least, "explicit words of advocacy of election or defeat" are required. *Id.* at 43.[25] Such a bright line was required because

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates cam-

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[24] As this Court has repeatedly observed, the guarantees of the First Amendment are "delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (when vague statutes interfere with the free exercise of fundamental rights, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibilty that [the] protected speech of others may be muted . . . .").

[25] The Court indicated that the following explicit terms satisfied the demanding "express advocacy" standard: " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' " *Buckley*, 424 U.S. at 44 n.52. Even with this narrowing construction, the Court struck down former § 608(e)(1), one of the provisions to which the court of appeals had applied its narrowing construction, as facially unconstitutional under the First Amendment. *Id.* at 51.

> paign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42.

Buckley stressed that a standard turning on the speaker's purpose or the listener's understanding is not sufficient.

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation *puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.*

Buckley, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)) (emphasis added).[26] *MCFL* adopted this analysis and held that, to be adequately clear, the standard must be limited to "pointed exhortations to vote for particular persons." *Id.* at 249. *See also id.* (the communication must contain an "explicit directive" to vote for or against a particular candidate).

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[26] The Court also used the "express advocacy" standard in *Buckley* to narrowly construe former § 434(e) (now § 434(c)(1)), which requires every person (other than a political committee or candidate) who makes contributions or expenditures aggregating over $100 to file a disclosure statement with the FEC. Although FECA defined "contributions" and "expenditures" as providing money or other valuable assets "'for the purpose of . . . influencing' an election," the Court nevertheless found "serious problems of vagueness." *Id.* at 76-77.

C. The FEC's "Electioneering Message" Standard Is Hopelessly Vague, Open-Ended and Subjective, and Therefore Violates the Constitution.

The FEC contended below, and the court of appeals here held, that the bright-line rule established by *MCFL* and *Buckley* should not be applied to § 441a(d) and that an "electioneering message" test should be adopted instead. According to the court of appeals, an "electioneering message" is one reflecting a "design" or "purpose" of "influencing the outcome" of an election and would be so understood by a "reasonable" reader. J.A. 45-46. Thus, the courts of appeals here adopted a standard very similar to the one accepted by the court of appeals in *Buckley* and rejected by this Court. The vagueness of the "electioneering message" standard is manifested by the FEC's repeated failure—during nearly ten years of litigation—to distinguish between Wirth Facts #1, which the Commission contends falls within the standard, and the Colorado Party's other advertisements, which the Commission found did not.

Vagueness also invites intrusive and unjustified government investigation of a political party's conduct and motives. In implementing the vague and subjective "electioneering message" standard, the FEC below sought and obtained discovery from the Colorado Party concerning:

- The identity of the Party official who decided to make Wirth Facts #1. J.A. 199.
- The subjective reason(s) why the Party (and its representatives) decided to make Wirth Facts #1. J.A. 201.
- The general political context in which Wirth Facts #1 was made, including judgments as to who was likely to emerge as the candidate of the Democratic Party. J.A. 196-98.
- Whether any voters might find a given fact in Wirth Facts #1 sufficient to motivate, in whole or in part, a vote for or against any candidate. J.A. 200-01.

In short, the "electioneering message" formulation boils down to a classic "totality of the circumstances" test in which the answer can never be known in advance. The Court held this kind of *post-hoc* inquiry unacceptable in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 794 (1988), because it "necessarily chill[s] speech in direct contravention of the First Amendment's dictates." Under *Riley*, *Buckley*, and *MCFL*, the "electioneering message" standard must be rejected. Only the standard of express advocacy could cure the vagueness of § 441a(d).

D. The FEC's Recent Expansive and Baseless Interpretation of This Court's "Express Advocacy" Standard Is Also Unconstitutionally Vague.

By "express advocacy" the Colorado Party means *express* advocacy, and not the concept of implied express advocacy which the FEC has sought to impose by adjudication and, most recently, by rulemaking.

On July 6, 1995, the FEC issued a definition of "express advocacy," which states:

> Expressly advocating means any communication that . . . [w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because . . . [r]easonable minds could not differ as to whether [the communication] encourages actions to elect or defeat one or more clearly identified candidate(s) or *encourages some other kind of action.*

11 C.F.R. § 100.22(b)(2) (emphasis added).[27]

Although the FEC's new revised definition purports to clarify the kinds of communications that constitute "express advocacy," the definition clearly encompasses implied as well as express meanings, and sanctions a broad, *post-hoc* investigation into undefined "external events." This new definition is merely the Commission's latest attempt to import the same open-ended "electioneering message" standard into FECA under the guise of "express advocacy."[28]

[27] The FEC's revised definition went into effect on October 5, 1995.

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The FEC's "electioneering message" standard and its broad and unfounded interpretation of "express advocacy" create treacherous vagueness problems. In order to avoid constitutional vagueness, § 441a(d)—at the very least—must be limited to communications that satisfy *this Court's* strict, bright-line "express advocacy" standard.

III. THE FEC'S INTERPRETATION OF § 441a(d) IS ENTITLED TO NO DEFERENCE.

If the First Amendment allows the government to forbid political parties from spending more than pennies-per-voter "in connection with" a general election—and it does

[28] In addition to the promulgation of this new regulation, the FEC's attempts to expand the definition of "express advocacy" into "implied advocacy" are longstanding and well documented. *See, e.g., Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir.) (rejecting the FEC's contention that a newsletter identifying candidate positions on abortion issues but explicitly refusing to endorse any candidate was express advocacy), *cert. denied sub nom. FEC v. Keefer*, 502 U.S. 840 (1991); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) ("[T]he FEC would aparently have us read 'expressly advocating' . . . to mean for the purpose, express *or implied*, of encouraging election or defeat . . .") (emphasis in original); *id.* ("[C]ontrary to the position of the FEC, the words 'expressly advocating' mean[] exactly what they say."); *FEC v. Christian Action Network*, 894 F. Supp. 946, 952 (W.D.Va. 1995) (Rejecting the FEC's position that one commercial was express advocacy because the only immediate action called for by the commercial was for viewers to call [the Defendant] if they agreed with the Defendant's opposition to a 'gay rights agenda.'"); *FEC v. NOW*, 713 F. Supp. 428, 434 (D.D.C. 1989) ("NOW's letters do not contain pointed exhortations to vote for or against particular persons. The three mailings include no explicit words directing the reader how to vote."); *FEC v. AFSCME*, 471 F. Supp. 315, 316-17 (D.D.C. 1979) (rejecting the FEC's position that a poster depicting President Ford and excerpting Ford quotation, "I can say from the bottom of my heart—the President of the U.S. is innocent and he is right," was express advocacy).

not—the settled First Amendment principles discussed above mandate that the "in connection with" language of § 441a(d) be given a narrow and precise construction. Misapplying *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984) (*"Chevron"*), the court of appeals rejected the clear and objective "express advocacy" standard announced in *Buckley* and *MCFL*, concluding instead that it must "defer" to an uncertain and subjective "electioneering message" standard supposedly adopted in two of three conflicting FEC advisory opinions. J.A. 41-44.

This ruling was fundamental error. Even if the FEC were "the type of agency" that merits *Chevron* deference under certain circumstances, *see DSCC*, 454 U.S. at 37, the FEC's expansive interpretation of § 441a(d), which raises grave constitutional concerns, is not entitled to *Chevron* deference. In addition, these FEC advisory opinions are not the type of agency decisions to which courts should defer. Instead, this Court should apply traditional tools of statutory construction and read § 441a(d) to apply only to "express advocacy."

A. Deference Is Not Appropriate Because the FEC's Interpretation of § 441a(d) Raises Substantial Constitutional Concerns.

As a general matter, administrative agencies are not competent to resolve constitutional issues. *See Ostereich v. Selective Service Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Public Utilities Comm. v. United States*, 355 U.S. 534, 539 (1958). Instead, "the federal judiciary is supreme in the exposition of the law of the Constitution. . . ." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). In particular, where First Amendment interests are involved, not even Congress can "limit judicial inquiry," *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989), or excuse the court from the "task of assessing the First Amendment interest at stake and weighing it against the public interest." *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 91 (1977).

Therefore, an agency's interpretation of a statute is not entiled to deference if it raises "serious constitutional questions." *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995). In such a case, any predicate for *Chevron* deference evaporates and the courts must "independently" decide what the Constitution requires.

> Even if the [agency] construction of the Act were thought to be a permissible one, we are quite sure that . . . we must independently inquire whether there is another interpretation not raising these serious constitutional concerns. . . .

DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 577 (1988); *see also Miller*, 115 S. Ct. at 2491 ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.") (citing *DeBartolo*, 485 U.S. at 574-75); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) ("We are obligated to construe the statute to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress. Accordingly, the Commission is not entitled to *Chevron* deference with regard to its interpretation of the statute.") (citing *DeBartolo*, 485 U.S. at 575).

As explained above, even if § 441a(d) were constitutional on its face, the FEC's interpretation of that statue raises insurmountable vagueness concerns. Accordingly, deference is wholly inappropriate.

B. Traditional Tools of Statutory Construction Establish That § 441a(d) Limits Only "Express Advocacy."

Three traditional tools—*stare decisis*, the presumption that the same words in the same statute have the same meaning, and the presumption that statutes should be construed so as to avoid constitutional problems—establish that the phrase "in connection with" means "express advocacy." *See Chevron*, 467 U.S. at 843 n.9.

1. Stare Decisis *Establishes That Identical and Similar Language in Related FECA Provisions Means "Express Advocacy."*

FECA is over 20 years old. As with any statute with such a history, construction does not proceed on a blank slate. To the contrary, where this Court has declared the meaning of a provision, that holding is authoritative. *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

MCFL holds that FECA's standard of "in connection with" a general election, as it is used in the prohibitions on corporate, bank, and union expenditures in § 441b, means "express advocacy." 479 U.S. at 248-49. *Buckley* holds that similar language used in FECA concerning expenditures "relative to" a clearly identified candidate and "for the purpose of . . . influencing" a federal election mean "express advocacy." 424 U.S. at 42, 80. Under the traditional tool of *stare decisis*, these holdings are fixed points from which analysis of the remainder of FECA may proceed.

2. *The Presumption That the Same Words in the Same Statute Have the Same Meaning Gives a Clear Meaning to § 441a(d).*

Statutes properly are interpreted as a whole. *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). Where the same language is used in the same statute, it is presumed to have the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Thus, the "in connection with" language of § 441a(d) presumptively has the same meaning of "express advocacy" that this Court authoritatively gave to identical language in § 441b.

The court of appeals noted that this presumption is not controlling if identical words "are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." J.A. 39 (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). However, no

such dissimilar circumstances exist here. The "in connection with" language in both § 441a(d) and § 441b serves the identical function of specifying the necessary link between an expenditure and an election. Moreover the dominant concern giving rise to the "express advocacy" standard was to provide a clear and objective guideline for those who plan to engage in political speech. *Buckley*, 424 U.S. at 42, 80. This concern is equally applicable to § 441a(d), for there is no reason to believe that political parties making expenditures are any less in need of a clear standard than corporations and unions (*MCFL*) or individuals (*Buckley*).

Apparently starting from the premise that speech by political parties merits less First Amendment protection than speech by corporations, banks or unions, the court of appeals reasoned that Congress theoretically could have decided to impose a different standard in § 441a(d) than in § 441b. J.A. 39-41. However, there is no evidence that Congress, in using identical language, actually intended different standards to apply.

3. *Section 441a(d) Must Be Interpreted So as to Avoid the Serious Constitutional Problems That Would Result from an "Electioneering Message" Standard.*

The presumption that statutes should be construed so as to avoid constitutional problems is another of the traditional tools of statutory construction applied before any deference is afforded to agency ivews. *See DeBartolo* 485 U.S. at 575. "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id.* The FEC's dubious interpretation of § 441a(d) has been addressed above.

Because these traditional tools of statutory construction provide a clear meaning for § 441a(d), there is no ambiguity that opens the door to *Chevron* deference. Nor

could the FEC reasonably have construed § 441a(d) any other way.

C. The FEC Advisory Opinions Cannot Form the Basis for *Chevron Deference.*

Chevron deference rests on the presumed general intent of Congress. 464 U.S. at 844. Where, as here, Congress has specifically forbidden such deference, or where agency decisionmaking is not reasoned or consistent, deference is not proper.

1. *FECA Forbids the FEC From Establishing a Rule of Law Through Advisory Opinions.*

FECA expressly limits the way that the FEC may establish a "rule of law." Section 437f(b) provides that:

> Any rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued . . . except in accordance with the provisions of this section.

J.A. 225.

Through this provision, Congress specifically sought to assure that the Advisory Opinion process would be used solely to grant safe harbors for political speech, not to confer upon the Commission power to limit speech or engage in informal rulemaking. Thus, in addition to the general provisions quoted above, § 437f(c)(1) provides that FEC advisory opinions are not to extend beyond "any specific transaction or activity which is indistinguishable in all its material effects." Where FEC action is intended to regulate the public, the provisions of § 438(d) require that the FEC honor the requirements of the Administrative Procedures Act and that the FEC give Congress advance notice of any proposed "rule of law" along with "a detailed explanation and justification."[29] How-

[29] Until this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), rules proposed by the FEC could have been vetoed by either house of Congress. *See* § 438(d)(2).

ever, none of this occurred with respect to the "electioneering message" standard.

By holding that it "must defer" to an agency interpretation of § 441a(d) supposedly adopted in two Advisory Opinions, the court of appeals ignored the explicit provisions of FECA and, hence, fundamentally misapplied *Chevron.*

2. *The Advisory Opinions Here Do Not Supply an Interpretation Worthy of Deference.*

The three Advisory Opinions cited by the court of appeals do not establish an FEC position that is worthy of deference. Two of these Advisory Opinions, which supposedly set forth the vague "electioneering message" standard, do not reflect any consideration of First Amendment rights, nor do they provide an explanation for any deviation from an earlier opinion adopting the "express advocacy" standard.

The first Advisory Opinion addressing the meaning of "in connection with" in § 441a(d) states:

> if the [party] newsletter includes communications *expressly advocating the election or defeat of a clearly identified candidate* for Federal office, the expenses . . . must be treated as a general election expenditure under 2 U.S.C. § 441a(d).

FEC Advisory Opinion 1978-46, Fed. Election Camp. Fin. Guide (CCH) ¶ 5348 (1978), J.A. 256-57 (emphasis added). The court of appeals conceded that this Advisory Opinion "can be read to adopt the express advocacy position." J.A. 42 n.7. In fact, that court did not suggest how else the Advisory Opinion reasonably could be read.

Seven years later, when asked about party advertisements that target "the current Democratic presidential candidates," "question or challenge the candidate's statements, position, or record," and then contain "a partisan statement to 'Vote Republican,'" the FEC, in Advisory

Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (1984), J.A. 265, said:

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46.

Given its citation to AO 1978-46, AO 1984-15 seems to stand for the proposition that an advertisement pairing criticism of an identified Democratic candidate with an express statement to "Vote Republican" amounted to "express advocacy." Certainly, the opinion neither announces nor justifies a shift to a new "electioneering message" standard. Indeed, the term "electioneering message" appears nowhere in AO 1984-15.

One year later the FEC construed AO 1984-15 to mean that § 441a(d) requires only an identified candidate and an "electioneering message," which it defined as "statements 'designed to urge the public to elect a certain candidate or party.' " FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (May 30, 1985), J.A. 273 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)). This clearly seems to substitute a lesser and subjective standard for the objective test of "express advocacy." The FEC did not acknowledge any change and, incredibly, claimed to rely on AO 1978-46, which applied an express advocacy standard, as authority for its newly devised standard.

The FEC's view is entitled to no deference because the FEC has provided no explanation whatsoever for any *change* in position. This Court has determined that an agency's first construction of a statute deserves particular deference. A new and different agency position may also deserve deference, but only if the agency acknowledges and explains the change. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 187 (1991); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). The FEC did neither.

Indeed, the continued reliance on AO 1978-46, which adopted an "express advocacy" standard, suggests that the FEC may not even have recognized that a change in its position had occurred.

In addition, an agency's interpretation of a statute must be set aside where "the agency has . . . entirely failed to consider an important aspect of the problem." *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Here the FEC failed to discuss the First Amendment implications of the "electioneering message" standard.

Moreover, an agency's *post hoc* rationalization before the courts does not suffice, because "an agency's action may not be upheld on grounds other than those relied on by the agency." *National R.R. Passenger Corp. v. Boston & Maine R.R.*, 503 U.S. 407, 420 (1992) (citation omitted). In none of the Advisory Opinions does the FEC discuss the types of considerations that FEC counsel relied upon below to justify an "electioneering message" construction of § 441a(d). *See* Reply Appeals Brief of the Federal Election Commission at 7-8, 10 (justifying the "electioneering message" standard as necessary to prevent circumvention of contribution limits and noting that "people of common intelligence would have no difficulty understanding" what speech would be prohibited under this standard).

Where, as here, the agency does not acknowledge any change, cites earlier contrary authority as if no change had occurred, and gives no explanation for the change, the agency position lacks the quality necessary to support *Chevron* deference. And this is doubly so where core First Amendment rights are at stake and where reliance upon these types of Advisory Opinions is prohibited by FECA.

CONCLUSION

For all the foregoing reasons, Petitioners the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as Treasurer, respectfully pray that the judgment below be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS JONES, TREASURER, PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Federal Election Commission reasonably determined that the payments at issue in this case were subject to the Federal Election Campaign Act's limitations on contributions to candidates for federal office, as defined to include coordinated expenditures in support of those candidates.

2. Whether application of the Act to the payments at issue in this case violated the First Amendment.

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In the Supreme Court of the United States

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No. 95-489

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS JONES, TREASURER, PETITIONERS

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 32-48) is reported at 59 F.3d 1015. The opinion of the district court (J.A. 17-31) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A suggestion for rehearing in banc was denied on September 6, 1995. J.A. 49. The petition for a writ of certiorari was filed on September 21, 1995, and was granted on January 5, 1996 (116 S. Ct. 689). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.*, are set forth in the appendix to this brief: 2 U.S.C. 431(8)(A)(i) (definition of "contribution"), 431(9)(A)(i) definition of "expenditure"), 431(17) (definition of "independent expenditure"), 441a(a)(1) and (2) (dollar limits on contributions), 441a(a)(7)(B)(i) (treatment of coordinated expenditures), 441a(d) (expenditures by political party committees).

STATEMENT

1. This case concerns the Federal Election Campaign Act of 1971 (FECA or Act), as amended, 2 U.S.C. 431 *et seq.* The Act imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1,000, and multicandidate political committees [1] no more than $5,000, to any candidate with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A). The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). The Act defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i).

[1] A multicandidate political committee is "a political committee which has been registered under [2 U.S.C. 433] for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." 2 U.S.C. 441a(a)(4); see 11 C.F.R. 100.5(e)(3).

Under the regulatory scheme established by the Federal Election Commission (FEC or Commission),[2] application of the statutory contribution limits to expenditures by political parties depends upon whether an expenditure is "allocable" or "attributable" to a particular candidate. FEC Adivisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185 (May 30, 1985) (AO 1985-14); see FEC Advisory Op. 1984-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5766 (May 31, 1984). "Generic" appeals for public support for a party's federal candidates (*e.g.*, "Support Republicans for Congress") are considered "expenditures" (because they are made "for the purpose of influencing" federal elections, 2 U.S.C. 431(9)(A)(i)), but they are not allocable or attributable to particular candidates. See AO 1985-14, at 11,185-11,186. They are therefore not deemed to be "coordinated" expenditures—expenditures made "in cooperation, consultation, or concert, with" a candidate or the candidate's agents, 2 U.S.C. 441a(a)(7)(B)(i), and are, consequently, not subject to the Act's contribution limits. Where a party expenditure is used to finance communicative activities, the Commission has determined that the expenditure will be considered attributable or allocable to a particular campaign only if the communication refers to a "clearly identified candidate" and contains an "electioneering message." AO 1985-14, at 11,185.[3]

[2] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has expressly authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1), 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

[3] Some coordinated expenditures do not involve speech at all, making the "electioneering message" test irrelevant. For example,

If a party committee's expenditure *is* attributable to a particular candidate, it is deemed by the Commission, as a matter of law, to be made "in cooperation, consultation, or concert, with" that candidate. 2 U.S.C. 441a(a)(7)(B)(i).[4] All party "expenditures" attributable to particular candidates are therefore treated as "coordinated expenditures," and are subject to the Act's limitations on contributions. The Act, however, allows party committees to make such coordinated expenditures in amounts substantially greater than the contribution limits that apply to individuals and to other organizations.[5] An exception to the Act's general contribution limits thus provides that, "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," the national and state committees of a political party "may make expenditures in connection with the general election campaign of candidates for Federal office" up to certain specified amounts. 2 U.S.C. 441a(d)(1).[6] See H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for [Section

a party committee's payment to hire security guards for a candidate's campaign appearance would be a coordinated expenditure subject to the Act's contribution limits.

[4] Political "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28-29 n.1 (1981) (*DSCC*). See 11 C.F.R. 110.7(b)(4) (party committees "shall not make independent expenditures in connection with the general election campaign of candidates for Federal office").

[5] In addition to limits imposed by the Act on individual contributions, it also places a general limit of $5,000 upon a multicandidate political committee's contributions to any candidate for federal office. 2 U.S.C. 441a(a)(2)(A).

[6] In determining whether a party expenditure for communicative activity is made "in connection with" a general election campaign for purposes of Section 441a(d), the Commission employs the same test (depiction of a "clearly identified candidate" plus communication of an "electioneering message") that it utilizes in determining

441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"). In elections for the United States Senate, the national and state party committees may each expend the greater of $20,000 or 2 cents multiplied by the voting age population of the State in which the election is held. 2 U.S.C. 441a(d)(3)(A).[7] If a state party committee chooses not to make the coordinated expenditures permitted by law, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-43 (1981).

The FECA requires detailed recordkeeping and reporting of all contributions and expenditures. 2 U.S.C. 432, 434. Coordinated expenditures made by political party committees pursuant to Section 441a(d) must be reported by the committees separately from other contributions and expenditures. 2 U.S.C. 434(b)(4)(H)(iv).

2. On March 14, 1986, petitioner Colorado Republican Federal Campaign Committee (the Committee) assigned to the National Republican Senatorial Committee (NRSC) its entire coordinated expenditure authority ($103,248) for the 1986 Colorado Senate campaign, in which one United States Senate seat was to be contested. J.A. 35, 175. In January, 1986, then-Representative Timothy E. Wirth, a Democrat, registered with the FEC as a candidate in that year's Colorado United States Sen-

whether an expenditure is attributable to an individual candidate. See AO 1985-14, at 11,185; FEC Advisory Op. 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5561, at 10,691 (Oct. 24, 1980).

[7] As construed by the Commission, Section 441a(d) permits a state party committee to make coordinated expenditures up to the limits set out in Section 441a(d)(2) and (3) in addition to the $5,000 that can be contributed directly to the candidate. See 11 C.F.R. 110.7(b)(3); AO 1985-14, at 11,186 n.5. Thus, if a party committee's coordinated expenditures exceeded the limits established by Section 441a(d)(2) and (3), the excess expenditure could be treated, up to the amount of $5,000, as an in-kind contribution falling within the limitations of Section 441a(a)(2).

ate election. J.A. 33. In April, 1986, the Committee spent $15,000 to broadcast a radio advertisement, "Wirth Facts #1." See J.A. 56, 64. The text of the advertisement was as follows:

> Paid for by the Colorado Republican State Central Committee.
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

J.A. 161. At a press conference contemporaneous with the broadcast of the advertisement, the chairman of the Colorado Republican Party stated that only after "the public know[s] what Tim Wirth's record *really is* * * * will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator." J.A. 148. The chairman asserted that "[i]t's too bad that [Wirth] has only discovered the need for a strong national defense now that he's running for the Senate." J.A. 146. At the time that the advertisement was broadcast, neither the Democratic nor the Republican Party had nominated its candidate for the Colorado Senate seat. J.A. 33. Three candidates were in contention for the Republican nomination. J.A. 195-196.[8]

[8] The Committee made the expenditure from its federal account, see 11 C.F.R. 102.5(a)(1)(i), but did not report the expenditure to the FEC as being in connection with the Colorado Senate campaign. The Committee's report to the Commission did reflect the expenditure's electoral purpose, however, by characterizing it as "Voter Information to Colorado Voters—Advertising." J.A. 179.

After investigating an administrative complaint filed by the Colorado Democratic Party pursuant to 2 U.S.C. 437g(a)(1), the FEC determined that the Committee's expenditure on "Wirth Facts #1" was a coordinated party expenditure subject to the limitations of Section 441a of the FECA. Because the Committee had previously assigned its entire Section 441a(d) coordinated expenditure authority to the NRSC,[9] the Commission found probable cause to believe (see 2 U.S.C. 437g(a)(4)) that it had violated 2 U.S.C. 441a(f), which prohibits contributions and expenditures in violation of Section 441a. Because the Committee had failed to report the payment as an expenditure under Section 441a(d), the FEC also found probable cause to believe that the Committee had violated the reporting requirements of 2 U.S.C. 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). J.A. 136-139; Pet. App. 43a-46a, 56a.[10]

3. After conciliation efforts under 2 U.S.C. 437g(a)(4) were unsuccessful, the Commission authorized the filing of this civil enforcement action.[11] The district court

[9] If the Committee had not assigned to the NRSC its coordinated expenditure authority, the payment at issue in this case would have been authorized by Section 441a(d). Under the statutory formula set forth in Section 441a(d)(3)(A)(i), the Committee would have been authorized to make expenditures of up to $103,248 in connection with the 1986 Senate campaign. J.A. 35. The Committee spent $15,000 on "Wirth Facts #1." J.A. 33.

[10] The administrative complaint also challenged the Committee's payments for two other radio advertisements and two pamphlets, all of which criticized Representative Wirth's record without alluding to his Senate campaign. By a vote of 3-3, the Commission failed to find probable cause to believe that those payments violated the Act. J.A. 136; see Pet. App. 93a-105a.

[11] The complaint in this action named the Committee's treasurer, as well as the Committee, as respondents, and the treasurer is a petitioner in this Court. A political committee's treasurer has legal responsibility for approving all expenditures, 2 U.S.C. 432(a), for keeping the committee's records, 2 U.S.C. 432(c), and for filing

granted petitioners' motion for summary judgment. J.A. 17-31. The court acknowledged that a party expenditure can be "coordinated" even if it is made before the party's nominee is officially selected. J.A. 23. The court reasoned that the expenditure here "was made on behalf of the Republican candidate, whomever [*sic*] that might be; and it is irrelevant that no particular person had been designated." *Ibid.* The court concluded, however, that the expenditure in question had not been made "in connection with the general election campaign of a candidate for Federal office" within the meaning of Section 441a (d)(3), because the advertisement paid for by the expenditure did not contain "express advocacy" of the election or defeat of a particular candidate. J.A. 23-28.[12]

In so holding, the district court placed substantial reliance on this Court's decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which involved a prohibition (2 U.S.C. 441b(a)) on independent expenditures by corporate entities "in connection with any election" to any federal office. The Court

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the committee's disclosure reports with the Commission, 2 U.S.C. 434(a)(1).

[12] This Court has stated that an express advocacy test would restrict the application of the statutory limits "to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley* v. *Valeo*, 424 U.S. at 44 (per curiam). Express advocacy would include the use of terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. See also *id.* at 80 ("spending that is unambiguously related to the campaign of a particular federal candidate"); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (publication found to contain express advocacy where it "not only urge[d] voters to vote for 'pro-life' candidates, but also identifie[d] and provide[d] photographs of specific candidates fitting that description"); *FEC* v. *Furgatch*, 807 F.2d 857, 864 (9th Cir.) (speech that is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate"), cert. denied, 484 U.S. 850 (1987).

in *MCFL* held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249. Applying the canon of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning," the district court concluded that the phrase "in connection with" should be given the same construction in Section 441a(d)(3) as in Section 441b. J.A. 24. The court rejected the FEC's contention that the phrase "in connection with," as used in Section 441a(d)(3), should be construed more broadly to cover all communications that contain a "clearly identified candidate" and an "electioneering message." J.A. 25-28; see page 3 & note 6, *supra*. The court concluded that "Wirth Facts #1" did not contain "express advocacy" of Wirth's defeat, J.A. 28-31, and that petitioners' expenditure on the advertisement therefore "was not subject to section 441a (d)(3) limitations and did not violate the Act," J.A. 31. Because the district court found that no violation of the FECA had occurred, it did not reach petitioners' constitutional challenge to the statutory restrictions on political party expenditures. *Ibid.*

4. The court of appeals reversed. J.A. 32-48. The court first stated that "[t]he FECA does not clearly manifest the meaning Congress intended to attach to the 'expenditures in connection with' language in § 441a(d)(3)." J.A. 37. The court found *MCFL* inapposite, explaining that the independent expenditures limited by Section 441b are substantially different—both in their treatment under the FECA and in the degree of protection afforded them by the Constitution—from the coordinated expenditures at issue here. J.A. 39-41. In light of the FEC's " 'primary and substantial responsibility for administering and enforcing' the FECA," J.A. 42 (quoting *Buckley* v. *Valeo*, 424 U.S. at 109 (per curiam)), the court of appeals concluded that the Commission's "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candi-

date and conveying an electioneering message is a reasonable one to which [the court] must defer," J.A. 42. The court found that Representative Wirth was a clearly identified candidate at the time "Wirth Facts #1" was broadcast, J.A. 44, and that the advertisement "unquestionably contained an electioneering message," J.A. 45.

The court of appeals then addressed and rejected petitioners' constitutional challenge to the statutory restrictions on coordinated party expenditures. The court observed that "[t]he primary purpose of the contribution and expenditure caps in the FECA [is] to prevent corruption or the appearance of corruption," J.A. 46, and that "[t]he same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees," J.A. 47. The court rejected the claim that contributions from committees operated by a political party can never be corrupting, *ibid.*, and concluded that, "[b]y treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, 'secur[ing] a political *quid pro quo* from current and potential office holders,'" J.A. 48 (quoting *Buckley* v. *Valeo*, 424 U.S. at 26 (per curiam)).

SUMMARY OF ARGUMENT

I. In contending that their conduct did not violate the Federal Election Campaign Act of 1971, petitioners argue that the payments at issue in this case fall outside the coverage of 2 U.S.C. 441a(d) because they were not made "in connection with" the 1986 Colorado Senate campaign. Petitioners' focus on Section 441a(d) is misconceived. Section 441a(d) is not a *restriction* on spending by political parties; rather, it serves to *authorize* party expenditures that would otherwise be violative of the Act's limits on contributions. The pertinent statutory

question in this case, therefore, is not whether the payment at issue was prohibited by Section 441a(d), but whether it exceeded the statutory limitations on contributions, defined by the Act to include coordinated expenditures.

The payments at issue in this case fall squarely within the FECA's definition of "expenditure," which includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The Commission was not required to prove that the communications in question contained "express advocacy" of the election or defeat of a particular candidate. Based on constitutional concerns, this Court has construed FECA provisions governing independent expenditures to apply only to payments used for express advocacy. The Court has never applied that standard to coordinated expenditures, however, and it should not do so here. Because there would be little difficulty in "devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign," *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976) (per curiam), such a construction would eviscerate the Act's restrictions on coordinated expenditures. Such a construction would be especially unwarranted in light of post-*Buckley* amendments to the FECA, which incorporate an "express advocacy" requirement into the statutory definition of "independent expenditure" but not into the definitions of "contribution" and "expenditure."

The FEC's conclusion that the payments at issue here were subject to the Act's monetary limitations rests in part on the Commission's determination that, because "Wirth Facts #1" depicted a "clearly identified candidate" and communicated an "electioneering message," it was "attributable" to the 1986 Colorado Senate race. The Commission's standard for determining whether a party expenditure is attributable to a particular election

is entitled to substantial deference from a reviewing court, and the court of appeals correctly upheld the FEC's approach. There is, in particular, no basis for petitioners' contention that the Commission's "clearly identified candidate"/"electioneering message" standard represents an unexplained departure from prior FEC pronouncements. The Commission has also reasonably determined that, because "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28 n.1 (1981) (*DSCC*), all party expenditures attributable to individual candidates are deemed "coordinated."

II. The FECA's restrictions on coordinated expenditures by political parties do not violate the First Amendment. Those restrictions serve the government's compelling interests in (a) preventing the reality and appearance of quid pro quo corruption by the political parties themselves, and (b) preventing circumvention of the statutory limitations on campaign contributions by other donors.

A. Beginning with *Buckley* v. *Valeo*, this Court has recognized a sharp constitutional distinction between limitations on contributions to political candidates and limitations on independent expenditures. The Court has consistently upheld the FECA's limitations on contributions and coordinated expenditures because those limitations serve a compelling interest in foreclosing opportunities for the corruption of candidates. Those holdings are fully applicable here.

There is no merit to petitioners' contention that the Commission must produce record evidence showing that federal candidates have in fact been corrupted by contributions from a political party. This Court in *Buckley* did not require evidence of actual corruption by particular classes of contributors, but accepted Congress's judgment as to the need for prophylactic measures in order to prevent the fact and appearance of quid pro quo

corruption. Nor is there any basis for petitioners' argument that political parties are incapable of exerting a corrupting influence over the candidates whom they support. Political parties act through their employees and agents, and individual party officials may be tempted to use their control over the party's expenditures in order to advance their private interests. In any event, the danger at which the Act's contribution limitations are directed does not depend on the invidious motivation of the contributor. It inheres in any arrangement in which an official's actions are driven by the prospect of substantial monetary reward, even where the contributor who seeks to exercise "coercive influence," *Buckley* v. *Valeo*, 424 U.S. at 25 (per curiam), over the formulation of public policy is motivated solely by a concern for the public good.

Political parties have no constitutional entitlement to an exemption from the contribution limitations that apply to other donors. Although party officials may legitimately seek in a variety of ways to influence the behavior of members who hold public office, Congress may permissibly limit their ability to employ sizeable monetary contributions as a means of achieving their desired ends. Contrary to petitioners' contention, the FECA does not discriminate against political parties. To the contrary, Section 441a(d) permits parties to make coordinated expenditures far in excess of those that can be made by any other entity. In other respects as well, the Act includes special accommodations to party activities. Congress thus endeavored to strike an appropriate balance between the prevention of actual or apparent corruption and the desire to "assur[e] that political parties will continue to have an important role in federal elections." *DSCC*, 454 U.S. at 41. The Court should respect that balance.

B. The FECA's restrictions on coordinated party expenditures also serve the compelling governmental interest in preventing evasion of the contribution limits on in-

dividuals and political committees. Although individuals can contribute no more than $1,000 to a candidate, they can contribute up to $5,000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political committee operated by a national political party. 2 U.S.C. 441a(a). An individual who wished to provide financial support to a candidate in excess of the $1,000 limit might attempt to circumvent that statutory restriction by making a large contribution to that candidate's political party, with the expectation that the party would in turn expend the funds in support of the candidate. Nothing in the Act precludes candidates and officeholders from urging their contributors to make additional contributions to a party committee, and such solicitations are not unusual. Congress may legitimately act to prevent the use of such practices as means of circumventing the Act's restrictions on individual contributions.

C. The FECA provisions governing coordinated party expenditures are not unconstitutionally vague. Persons of "common intelligence," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973), would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign contained an "electioneering message." The availability of advisory opinions construing the Act as applied to particular factual circumstances provides further assurance that regulated parties can receive fair warning as to the nature of the conduct that the statute prohibits.

ARGUMENT

I. THE PAYMENTS AT ISSUE IN THIS CASE WERE GOVERNED BY THE LIMITATIONS OF 2 U.S.C. 441a(a)(2)

The Federal Election Campaign Act of 1971 (FECA or Act) provides that "[n]o multicandidate political committee shall make contributions * * * to any candidate

and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000." 2 U.S.C. 441a(a)(2)(A). The Act states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents"—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). The FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). Under the regulatory framework established by the FEC, a political party expenditure that is "attributable" to an individual candidate is treated as a coordinated party expenditure, and thus as subject to the contribution limits for that candidate. See 2 U.S.C. 441a(a)(7)(B)(i); page 3, *supra*.

Section 441a(d)(1), however, authorizes political parties to make coordinated expenditures that would otherwise exceed the Act's limitations on contributions to candidates. Section 441a(d)(1) states that, "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," a national or state political party "may make expenditures in connection with the general election campaign of candidates for Federal office," subject to the monetary limits set forth in Section 441(d)(2) and (3). Section 441a(d)(3) provides in turn that, in elections for the United States Senate, a national or state party committee "may not make any expenditure in connection with the general election campaign" in excess of the greater of $20,000 or 2 cents multiplied by the voting age population of the State. 2 U.S.C. 441a(d)(3)(A).

Petitioners contend that the payment at issue in this case was not made "in connection with" the 1986 Colorado Senate campaign, and that Section 441a(d) is therefore inapplicable. Petitioners base that argument on the fact that "Wirth Facts #1" was not found to have contained "express advocacy" of the election or defeat of a particular candidate.[13] Petitioners err in focusing their attention on the applicability of Section 441a(d) to the payment they made. That provision does not impose restrictions upon political parties more stringent than those imposed by the rest of the Act. To the contrary, Section 441a(d) serves to *authorize* expenditures that would otherwise be impermissible because violative of the FECA's limits on contributions. See *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28 (1981) (*DSCC*) (Section 441a(d) "authorizes limited expenditures by the national and state committees of a political party * * * which otherwise would be impermissible"); H.R. Conf. Rep. No. 1057, 94th Cong., 2d

[13] A regulation recently promulgated by the FEC provides that communications will be considered to contain express advocacy if those communications

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

60 Fed. Reg. 35,305 (1995) (to be codified at 11 C.F.R. 100.22(b)). Because the Commission does not regard the express advocacy test as the appropriate standard for determining whether coordinated expenditures by political parties are permissible, the FEC took and takes no position on the question whether "Wirth Facts #1" contains express advocacy.

Sess. 59 (1976) ("but for [Section 441a(d)], these expenditures would be covered by the contribution limitations stated in [Section 441a(a)(1) and (2)]"); FEC Advisory Op. 1980-119, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5561, at 10,691 (Oct. 24, 1980) (AO 1980-119) ("The right to make 441a(d) expenditures connected with a general election is an exception for political party committees permitting them to engage in certain activity that would otherwise result in a contribution to the candidate with respect to whom the expenditure was made."). If petitioners were correct in arguing that the expenditure at issue here was not made "in connection with" the 1986 Colorado Senate election, making Section 441a(d) inapplicable to that payment, the expenditure would not thereby be exempted from the FECA's restrictions. Rather, the inapplicability of Section 441a(d) would mean that the payment would be governed by Section 441a(a)'s restrictions on contributions, as defined by Section 441a(a)(7)(B)(i) to include coordinated expenditures like that made by petitioners in this case.

Thus, the pertinent question in this case is not whether the Committee's payment for "Wirth Facts #1" was prohibited by Section 441a(d). The relevant question is whether the Act's limitations on contributions, defined to include coordinated expenditures, prohibited the payment made here. If the Commission properly concluded that the payment at issue here was a coordinated expenditure in an amount exceeding the Act's contribution limitations, Section 441a(d) could not authorize petitioners to make it, because the Committee had previously assigned to the National Republican Senatorial Committee (NRSC) its entire coordinated expenditure authority for the 1986 Colorado Senate campaign.[14]

[14] If the Committee had not assigned to the NRSC its coordinated expenditure authority, the payments at issue in this case would have been authorized by Section 441a(d). See note 9, *supra*.

The Court's inquiry should therefore focus on the questions (a) whether the Committee's payment for "Wirth Facts #1" was an "expenditure" within the meaning of the Act, and (b) whether that payment was properly treated by the Commission as a "coordinated" expenditure.[15] Petitioners do not contest either of those propositions. As we demonstrate below, both are correct. Because the payment for "Wirth Facts #1" exceeded Section 441a(a)(2)(A)'s contribution limits and was not authorized by Section 441a(d), petitioners' conduct violated the Act.

A. The Payments At Issue In This Case Were "Expenditures" Within The Meaning Of The FECA

1. The FECA defines the term "expenditure" to include "any purchase, payment, distribution, loan, advance,

[15] As noted above, see note 6, *supra*, under the FEC's implementation of the statute, the question whether a party expenditure is attributable to a particular campaign (and thus constitutes a coordinated party expenditure) turns on the same factors—depiction of a clearly identified candidate and communication of an electioneering message—as the question whether the expenditure is made "in connection with" that election. To construe the phrase "in connection with" more narrowly (*i.e.*, as covering only a subset of party expenditures attributable to individual elections) would not advance the interests of political parties. To the contrary, such an approach would create a category of political party expenditures that are subject (as coordinated expenditures) to the Act's contribution limitations but that are not authorized by Section 441a(d), thus disserving Section 441a(d)'s purpose of allowing party committees to make coordinated expenditures substantially in excess of those permitted to other donors.

As a practical matter, a determination that the Committee's expenditure for "Wirth Facts #1" was not made "in connection with" the 1986 Senate race would result in that expenditure not being subject to the Act's monetary limits. That would be so, however, not because the payment would fall outside Section 441a(d), but because it would fall outside Section 441a(a)(7)(B)(i).

deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The payments at issue in this case fall squarely within that definition. As the court of appeals observed, "[a]ny reasonable reading of 'Wirth Facts #1' * * * would leave the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee." J.A. 45 (quoting FEC Advisory Op. 1984-15, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5766, at 11,069 (May 31, 1984) (AO 1984-15)). That uncontested finding provides a sufficient basis for the determination that the payments in question were made "for the purposes of influencing" the 1986 Colorado Senate election and were therefore "expenditures" within the meaning of the FECA. 2 U.S.C. 431(9)(A)(i); cf. AO 1984-15, at 11,070 ("These advertisements effectively advocate the defeat of a clearly identified candidate in connection with [the presidential] election and thus have the purpose of influencing the outcome of the general election for President of the United States.").[16]

[16] On April 4, 1986 (J.A. 144), the date on which "Wirth Facts #1" began to air (J.A. 101), petitioner's chairman gave a press conference in which he linked criticisms of Wirth's own advertisements to the upcoming Senate election:

> In Colorado, a man is only as good as his word. After viewing [Wirth's] ads, Coloradans should ask, "What are Tim Wirth's words worth?" With blatant disregard for the facts, he has purchased television time to baldly misstate his record on two key issues: defense and federal spending.
>
> This press conference is to serve notice that Tim Wirth will not get away with it. His record will be scrutinized as it has never been, and we in the Republican party are committed to letting the public know what Tim Wirth's record *really is*. Only then will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator.

J.A. 147-148.

2. The Commission was not required to prove that the communication in question contained "express advocacy" of the election or defeat of a particular candidate in order to find that petitioners' disbursement for "Wirth Facts #1" constituted an "expenditure." In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed the proper construction of FECA provisions that placed limits upon, and required reporting of, independent expenditures "relative to" candidates for federal office or made "for the purpose of * * * influencing" a nomination or election. See *id.* at 41-42, 77 (per curiam). Because of constitutional concerns, the Court construed those provisions to apply only to payments for communications that "expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted); see *id.* at 43. In its subsequent decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (*MCFL*), the Court gave the same construction to 2 U.S.C. 441b's prohibition on independent corporate expenditures in connection with federal elections.

The *Buckley* Court thus construed the phrase "for the purpose of * * * influencing" in the Act's definition of "expenditure" as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 77-80 (footnote omitted) (per curiam). That holding, however, does not govern the statutory provisions at issue in this case. As we describe below, see pages 26-28, *infra*, "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," *DSCC*, 454 U.S. at 28-29 n.1, and party expenditures attributable to particular candidates are therefore treated as coordinated expenditures subject to the Act's contribution limits. The Court in *Buckley* did not apply the express advocacy test to such coordinated expenditures. Rather, the Court observed that "controlled or coordinated expenditures are

treated as contributions rather than expenditures under the Act." 424 U.S. at 46 (per curiam). The Court understood "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee * * * but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," and found that, "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." *Id.* at 78. It was only when the Court construed the statutory provisions as they applied to *independent* expenditures that it applied the express advocacy test. *Id.* at 78-79. See also *MCFL*, 479 U.S. at 249 (applying express advocacy requirement to 2 U.S.C. 441b, a statutory provision that "directly regulates independent spending"); *Orloski* v. *FEC*, 795 F.2d 156, 166-167 (D.C. Cir. 1986) ("[T]he Court limited [the express advocacy definition] to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions.").[17]

Even if the *Buckley* Court's treatment of the issue were not deemed dispositive, subsequent statutory amendments make clear that Congress did not intend the express advocacy test to apply to the statutory limitations on coordinated expenditures. As amended in 1976, shortly after this Court's decision in *Buckley*, the Act's definition

[17] In fact, the Court did not find that a narrowing construction was required even for independent expenditures of political committees. Because the Court found that political committees are by definition "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," the Court concluded that all expenditures of such committees "can be assumed to fall within the core area sought to be addressed by Congress" because "[t]hey are, by definition, campaign related." *Buckley* v. *Valeo*, 424 U.S. at 79 (per curiam).

of "independent expenditure" includes the requirement that the payment be one "expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. 431(17).[18] Other provisions of the Act also incorporate the express advocacy standard. See 2 U.S.C. 431(9)(B)(iii), 441d(a). The definitions of "contribution" and "expenditure," however, include no reference to express advocacy. See 2 U.S.C. 431(8)(A), 431(9)(A). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987) (per curiam) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The absence of an express advocacy requirement in the statutory definitions of "contribution" and "expenditure" is persuasive evidence that coordinated expenditures need not contain express advocacy in order to be subject to the Act's regulatory provisions.

Application of the "express advocacy" standard to the Act's limits on coordinated expenditures would have important and adverse consequences. That construction would permit any interest group—including a corporation, union, or political interest group—to make coordinated political expenditures in support of a candidate without financial limit, so long as those expenditures avoided "express advocacy." As this Court has observed, there would not be "much difficulty [in] devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley* v. *Valeo*, 424 U.S. at 45

[18] The Conference Report accompanying the 1976 amendments states that "[t]he definition of the term 'independent expenditure' * * * is intended to be consistent with the discussion of independent political expenditures which was included in *Buckley* v. *Valeo*." H.R. Conf. Rep. No. 1057, *supra*, at 38.

(per curiam). Application of the "express advocacy" standard to the statutory limits on coordinated expenditures would thus substantially impair the Act's effectiveness in reducing both the fact and the appearance of political corruption.

B. The Payments In Question Were "Coordinated Expenditures" Subject To The FECA's Limitations On Contributions

The FECA provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). Political party committees are "persons" for purposes of that provision. See 2 U.S.C. 431(11). The Commission's conclusion that a particular party expenditure is "coordinated" rests on two subsidiary determinations—one case-specific and one categorical. First, a party expenditure is coordinated only if it is attributable to a particular candidate (as distinct from "generic" appeals for support for the party's candidates as a group). See page 3, *supra*. That determination is made on a case-by-case basis and depends upon whether the communication "(1) depict[s] a clearly identified candidate and (2) convey[s] an electioneering message." AO 1985-14, at 11,185; see page 3, *supra*. If the expenditure is attributable to a particular candidate, it is then conclusively deemed to be coordinated with that candidate, based on the categorical determination that "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1. See 11 C.F.R. 110.7(b)(4) (party committees "shall not make independent expenditures in connection with the general election campaign of candidates for Federal

office"); FEC Advisory Op. 1988-22, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5932, at 11,471 n.4 (July 5, 1988) (with respect to the campaign expenditures of political party committees, "coordination with candidates is presumed and 'independence' precluded").

1. The Commission's standard for determining whether a party expenditure is attributable to a particular candidate is entitled to substantial deference from a reviewing court. As this Court recognized in *DSCC*, the Commission's broad statutory powers, its "inherently bipartisan" character, and the fact that its jurisdiction involves "the dynamics of party politics," make it "precisely the type of agency to which deference should presumptively be afforded." 454 U.S. at 37. See also, *e.g.*, *FEC* v. *Ted Haley Congressional Comm.*, 852 F.2d 1111, 1115 (9th Cir. 1988) (interpretations of the Act "by the FEC through its regulations and advisory opinions" are entitled to deference); *Common Cause* v. *FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (deference is "particularly appropriate" in FEC cases); *Orloski* v. *FEC*, 795 F.2d at 164 (FEC's advisory opinion authority indicates that "Congress intended the Commission to fill in gaps left in the statute and to resolve any ambiguities in the statutory language"); *National Republican Congressional Comm.* v. *Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986) (declining to resolve private lawsuit before FEC had construed relevant FECA provision, "[i]n light of the deference that must be accorded the FEC's interpretation of its own statute").

Petitioners challenge the court of appeals' decision to accord deference to the FEC's application of the statutory restrictions on political party expenditures. They contend (Br. 47-49) that in AO 1985-14 the Commission departed without explanation from a prior pronouncement that the Act's monetary limitations would apply to political party expenditures only if the communications in

question contained express advocacy.[19] In support of that assertion, petitioners rely on a single sentence from FEC Advisory Op. 1978-46, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978) (AO 1978-46), in which the Commission responded to an inquiry concerning legal restrictions on certain uses of corporate funds in connection with a party convention and newspaper. The Commission stated that "[t]he Federal statute relevant to your questions is 2 U.S.C. § 441b," *id.* at 10,346, and explained at length how that provision applied to the corporate expenditures described. The Commission then observed that, "if the newsletter includes communications expressly advocating the election or defeat of a clearly identified candidate for Federal office, the expenses of the newsletter attributed to those communications * * * must be treated as a general election expenditure of the Party under 2 U.S.C. § 441a(d)." *Id.* at 10,347.

That statement does not conflict with the "clearly identified candidate"/"electioneering message" standard subsequently enunciated in AO 1985-14. Any communication containing express advocacy would necessarily satisfy

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[19] Petitioners' additional contention (Br. 46-47) that Section 437f precludes deference to the Commission's advisory opinions unless they are promulgated as regulations was neither pressed nor passed upon below, and this Court therefore should not consider it. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). In any event, the argument is without merit. Advisory Opinions 1984-15 and 1985-14 did not adopt legislative rules of the sort requiring a formal rulemaking, but merely interpreted the terms of the Act "with respect to a specific transaction or activity," as provided in Section 437f. The construction of the Act enunciated in those advisory opinions is analogous to an interpretive rule, to which a reviewing court owes deference.. See, *e.g.*, *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 922 (D.C. Cir. 1991), cert. denied, 503 U.S. 970 (1992); *Kennedy* v. *Shalala*, 995 F.2d 28, 30 n.3 (4th Cir. 1993); *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 154 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).

the "electioneering message" standard of AO 1985-14, and AO 1978-46 did not state that communications that do not contain express advocacy cannot be coordinated party expenditures. That the language upon which petitioners rely was not intended to represent a limiting construction is shown by the remainder of the paragraph in which it appears, in which the Commission explained that the expenditures to which it was referring were those made "on behalf of a clearly identified candidate and [that] can be directly attributed to that candidate." AO 1978-46, at 10,347 (quoting 11 C.F.R. 106.1(c)). The Commission confirmed the latter formulation just two weeks later in FEC Advisory Op. 1978-50, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5353 (Sept. 19, 1978) (AO 1978-50), when the Commission stated that an expenditure for a get-out-the-vote drive would be subject to the Act's limitations on coordinated expenditures only if "those expenditures are made on behalf of clearly identified candidates to whom the expenditures can be directly attributed." *Id.* at 10,355. AO 1978-50 did not mention "express advocacy," but affirmed that the expenditure would be attributable to a federal candidate "if the purpose of the drive is to advocate the election of one or more clearly identified candidates for Federal office." *Id.* at 10,354. Petitioner has failed to identify a single instance in which the Commission has found, either in an advisory opinion or in an enforcement context, that a party expenditure was not subject to the Act's monetary restrictions because it did not contain express advocacy.

2. The Act defines a "political party" as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). The FEC's determination that political parties are "incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," *DSCC*, 454 U.S. at 28-29 n.1, is entitled to substantial

deference. That determination rests in part on the empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election.[20] The more significant point, however, is that a political party's function of nominating candidates and sponsoring them on the ballot is inconsistent with independent promotion of the candidates' election. Other groups or individuals bound as closely to a candidate's campaign as the candidate's party would also be incapable of making independent expenditures. See FEC Advisory Op. 1980-116, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5565 (Nov. 14, 1980); FEC Advisory Op. 1979-80, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5469 (Mar. 12, 1980); FEC Advisory Op. 1982-20, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5665 (Apr. 26, 1982). See also *FEC* v. *National Conservative Political Action Comm.*, 647 F. Supp. 987 (S.D.N.Y. 1986). Indeed, petitioner conceded in the court of appeals that its expenditures are correctly considered to be coordinated. See Pet. C.A. Br. 18-19 ("The Colorado Party

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[20] It is especially clear in the present case that the Committee was in fact coordinating with the eventual Republican nominee when "Wirth Facts #1" was aired, and that the expenditure for that advertisement was made to diminish Democratic candidate Wirth's chances against that nominee in the general election. The Committee's chairman testified that when the advertisement aired he was already "as involved as I could be" in the campaigns of all three candidates for the Republican nomination and that he "made all of the assets of the party that I could available to all three of them until the convention in which case we merged with the number one candidate and I made them all available to that one candidate." J.A. 195-196. The chairman testified that he decided to run the advertisement when he did because then-Representative Wirth "was getting away with saying things that were not being refuted by anyone and we had no candidate to refute it, and the only possible person to refute that was the party." J.A. 197.

cannot by law make 'independent expenditures,' nor does it wish to. The Colorado Party's argument is that it should be permitted to make unlimited 'coordinated expenditures' in support of its own candidates just as other groups are permitted to make unlimited 'independent expenditures.' ") (footnote omitted). See also Democratic National Committee, et al., Amicus Br. 14-15 ("[I]t is reasonable to assume * * * that parties cannot make 'independent' expenditures in the same way as other kinds of organizations" because of their "unique need to communicate and coordinate with their candidates").

That Congress regarded political party campaign expenditures as necessarily coordinated with the party's candidate is further demonstrated by the legislative history accompanying the 1976 amendments to the FECA. The Conference Report notes that Section 441a(d) serves to permit political party expenditures that would otherwise run afoul of the Act's limits on contributions:

> This limited permission allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process. Thus, but for this subsection, these expenditures would be covered by the contribution limitations stated in subsections (a)(1) and (a)(2) of this provision.

H.R. Conf. Rep. No. 1057, *supra*, at 59. That discussion presumes that party committee campaign expenditures fall within the statutory definition of "contributions."

II. THE FECA'S RESTRICTIONS ON COORDINATED EXPENDITURES MADE BY POLITICAL PARTIES DO NOT VIOLATE THE FIRST AMENDMENT

As we explain above, the payments at issue in this case are properly regarded as coordinated party expenditures and are therefore subject to the restrictions established by Section 441a(a) and (d)(3). Those restrictions do not

violate the First Amendment. The statutory limitations on expenditures by political parties serve two compelling governmental interests. First, the limitations serve to prevent both the reality and the appearance of quid pro quo corruption by the political parties themselves. Second, the limits help to prevent circumvention of the Act's restrictions on campaign contributions by other donors.

A. By Limiting Campaign Expenditures Coordinated With Candidates, Section 441a Serves A Compelling Governmental Interest In Avoiding Corruption And The Appearance Of Corruption

Beginning with *Buckley* v. *Valeo*, this Court has recognized a constitutional distinction between limitations on contributions to political candidates and limitations on independent expenditures. The Court in *Buckley* recognized that the FECA's contribution and expenditure limitations both limit associational and expressive activities protected by the First Amendment, and that such limits can be upheld only if they serve compelling governmental interests. See 424 U.S. at 14-15, 19-23 (per curiam). The Court upheld the FECA's limitations on contributions because those limits serve a compelling interest in preventing the corruption of candidates. The Court recognized that, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27.

The Court struck down the Act's limitations on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47 (per curiam). The Court held the independent expenditure limits to be

unconstitutional "because [it] found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (*NCPAC*). The Court has continued to emphasize the "fundamental constitutional difference" between contributions and independent expenditures, *ibid.*, and has uniformly upheld the Act's restrictions on contributions in candidate elections. See, *e.g.*, *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*).

As we describe above, see pages 2, 15, *supra*, Congress has determined that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, * * * shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). See *Buckley* v. *Valeo*, 424 U.S. at 46 (per curiam) ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA, and as such are already subject to [the] $1,000 and $5,000 limitations in §§ 441a(a)(1), (2)") (citation omitted). Because of a party committee's close and continuous relationship with the party's candidates, this Court has recognized that all expenditures by such a committee that are attributable to an individual election must be considered coordinated. *DSCC*, 454 U.S. at 28-29 n.1; see pages 26-28, *supra*. The statutory restrictions on party expenditures therefore fall within the anti-corruption rationale on which this Court has repeatedly relied.[21]

[21] As the Court noted in *Buckley*, the Act's contribution limits were originally based in part on two additional purposes: the desire "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections," 424 U.S. at 25-26 (per curiam), and the belief that "the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money," *id.* at 26. The Court in *Buckley* held that those purposes did not constitute compelling governmental interests that could justify the Act's restrictions on independent expenditures. *Id.* at 55-57. The Court concluded, however, that "[i]t is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

In the wake of this Court's decision in *Buckley*, Congress amended and reenacted the FECA, including Section 441a(d)'s provisions dealing specifically with campaign expenditures by political parties. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475. Both the text of Section 441a(d) and the pertinent 1976 legislative history reflect Congress's understanding that party expenditures in connection with federal election campaigns fall within the coverage of the Act's contribution limits, except insofar as Section 441a(d) permits political parties to make expenditures that would otherwise be barred. Thus, whatever combination of factors may have initially motivated Congress to limit expenditures by political parties, Congress chose to retain those limits after this Court's decision in *Buckley*. There is consequently no basis for petitioners' suggestion (Br. 27) that those limits should be regarded with particular suspicion on the ground that they were "expressly adopted for an unconstitutional purpose."

Petitioners contend that (1) because political parties pose no danger of actual or perceived corruption, they are constitutionally exempt from the limitations applicable to other contributors, and (2) Section 441a impermissibly discriminates against political parties by subjecting them to restrictions more stringent than those applicable to other organizational donors. Those arguments are incorrect.

1. a. Petitioners contend (Br. 26-34) that the Commission must produce record evidence showing that federal candidates have in fact been corrupted by contributions from political parties in order to justify the statutory

limitations on party expenditures. That argument ignores this Court's holding in *Buckley* that avoiding actual corruption is not the only compelling interest justifying limits on contributions and coordinated expenditures. As the *Buckley* Court recognized, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27 (per curiam). See *NRWC*, 459 U.S. at 208 ("[I]n *Buckley*, * * * we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.").

Because it is the opportunity for a quid pro quo that creates the appearance of corruption, the Court in *Buckley* did not require evidence of actual corruption by particular classes of contributors. Indeed, the *Buckley* Court assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29 (per curiam). The Court nevertheless upheld the FECA's $1,000 limit on individual contributions to candidates and political committees. The Court explained that it is "difficult to isolate suspect contributions," and that "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.[22] In dealing

[22] The Court emphasized that point when it upheld the application of the contribution limits to members of a candidate's immediate family, although it was not presented with either record evidence or legislative findings of familial corruption. The Court acknowledged that "the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members," but found that fact insufficient to support a conclusion "that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as non-family contributors." *Buckley* v. *Valeo*, 424 U.S. at 53 n.59 (per curiam).

with contributions and coordinated expenditures, the Court has consistently "accept[ed] Congress' judgment" and has refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210.[23] As the court of appeals in the instant case observed, "[t]he members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties." J.A. 47-48.

b. Petitioners' argument that political parties are incapable of corrupting party candidates is unpersuasive. Party committees are not abstract, disembodied entities. As this Court has observed, "[i]n the nature of things, a [party] committee must act through its employees and agents." *DSCC*, 454 U.S. at 33. There is no reason to believe that the individuals who control party committees are immune from the corrupting temptations and self-

[23] See also *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2378 (1995) (statute can be justified even under "strict scrutiny" based "solely on history, consensus, and 'simple common sense' ") (quoting *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992) (opinion of Blackmun, J.)). Petitioners' reliance (Br. 26) on *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003 (1995), is misplaced. The Court concluded in that case that the government had failed to show that its interest in workplace efficiency justified a broad ban on compensated writings and speeches by rank and file government employees. When it came to the possibility of influencing officials, however, the Court found that "Congress reasonably could *assume* that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a similar appearance of improper influence." *Id.* at 1016 (emphasis added).

interest of other persons. To the contrary, history demonstrates that individual officials of political organizations are particularly well-situated to exert a corrupting influence upon candidates and officeholders in order to advance their private interests.[24] See generally, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 88 n.4 (1990) (Stevens, J., concurring); *Igneri* v. *Moore*, 898 F.2d 870, 876 (2d Cir. 1990) (State may enact legislation to deter party officials from "capitalizing on their special relationships" with public officials to "curry[] favor for themselves and their associates").[25]

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[24] That history includes such notorious examples of corrupt political organizations as the Boss Tweed and the Tammany Hall machine, the 1876 Tilden/Hayes presidential election, the Custom House scandals of the 1880's, Teapot Dome, the Prendergast Machine, and Watergate. See, *e.g.*, Nathan Miller, *The Founding Finagler* (1976); Shelley Ross, *Fall from Grace: Sex, Scandal, and Corruption in American Politics from 1702 to the Present* (1988). If petitioners are correct in their assertion (Br. 31 n.20) that there have been no major public scandals involving party officials during the last 20 years, that fact may be evidence that the FECA's restrictions on party expenditures have been successful, rather than evidence that those restrictions are no longer needed. Cf. *Burson* v. *Freeman*, 504 U.S. at 208 (opinion of Blackmun, J.) ("The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them.").

[25] Petitioners argue (Br. 5, 30, 31, 32) that political parties are "insulate[d] * * * from any potentially corruptive influences" by the Act's disclosure requirements and restrictions on the amount and sources of contributions they can accept, and by the voluntary nature and diverse sources of the contributions they receive. Petitioners, however, are not unique in those respects. All political committees are voluntary associations that can accept contributions in amounts subject to the same limits in the Act that are applicable to petitioners, and all political committees must publicly report their contributions and expenditures. Nor does the diversity of a party committee's supporters distinguish it from an independent political committee, whose coordinated expenditures are subject to the Act's contribution limits. See *NCPAC*, 470 U.S. at 494 ("[A]pproximately 101,000 people contributed an average of $75 each to NCPAC and * * * approximately 100,000 people contributed an average of $25 each to [Fund for a Conservative Majority]."). Thus, with party committees, no less than other political committees, "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption." *Buckley* v. *Valeo*, 424 U.S. at 28 (per curiam).

In any event, the danger at which the Act's contribution limitations are directed does not depend on the invidious motivation of the contributor. As this Court observed in *Buckley*, "the primary interest served by [the FECA] is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25 (per curiam). Congress may legitimately attempt to combat that form of "corruption" even where the contributor who seeks to exercise "coercive influence" over the formulation of public policy is motivated solely by a concern for the common good. Thus, contrary to petitioners' suggestion (see Br. 32), the propriety of Congress's decision to limit political party expenditures in no way depends upon the assumption that party officials will be corrupt or self-serving.

Nor is there a basis for petitioners' contention (Br. 21) that "any effect the parties may have on candidates constitutes democracy, not corruption." Officials of political parties may legitimately seek in a variety of ways to influence the behavior of party members who hold federal offices. The FECA's restrictions on coordinated party expenditures do not reflect the view that parties and their officers should be precluded from exercising such influence. They reflect instead Congress's determination, repeatedly sustained by this Court in *Buckley* and its progeny, that efforts to influence public policy *by means of monetary contributions to candidates for federal office* pose distinctive dangers to the integrity of the democratic

process.[26] That party officials may have alternative methods of accomplishing the same ends does not mean that they are constitutionally entitled to employ the "coercive influence of large financial contributions," *Buckley* v. *Valeo*, 424 U.S. at 25 (per curiam), in seeking obedience to their views.[27]

This Court has recognized that "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). Political parties have no special status under

[26] The Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, authorizes federal funding for presidential candidates who satisfy the statutory criteria. Under the Act, federal funds are paid directly to the candidate. 26 U.S.C. 9006(b). An earlier proposal to provide campaign funds to the political parties rather than to the candidates was changed to ensure, *inter alia*, that "a national committee of a political party will not be able to use control of a large Federal payment as a weapon to dictate party policies and strategies to * * * candidates and potential candidates." S. Rep. No. 714, 90th Cong., 1st Sess. 15 (1967). See also, *e.g.*, *Playing Hardball: How Reaganites Push Reluctant Republicans to Back Tax-Rise Bill*, Wall St. J., Aug. 18, 1982, at 1 (Republican National Committee deputy chairman convinced two reluctant congressmen to vote for the President's budget cuts by offering them coordinated party expenditures. "The two congressmen rallied behind their president. And if they hadn't? 'I would have nailed them to the wall,' vows the deputy chairman."); Donna Cassata, *GOP Retreats on Hatfield, But War Far From Over*, Cong. Q., Mar. 11, 1995, at 728 ("[C]hairman of the National Republican Senatorial Committee * * * suggested the day after the vote [rejecting a balanced budget amendment] that the party might withhold funds from [Senator] Hatfield's reelection campaign in 1996 as punishment.").

[27] Officials such as the President, the Speaker of the House of Representatives, and the Senate majority and minority leaders exercise influence over the voting behavior of legislators within their own political parties. No one would suggest, however, that the occupants of those offices could assert a constitutional right to make or direct monetary contributions to candidates for the Senate or House in amounts greater than those permitted by the FECA.

the Constitution, however, that would require that they be exempted from the limits on coordinated expenditures that apply to other voluntary organizations (whose members also possess a constitutionally protected "freedom to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).[28] See *Republican Party of Arkansas* v. *Faulkner County*, 49 F.3d 1289, 1297 (8th Cir. 1995) ("The rights of political parties derive from the associational rights of members and candidates, and it would make little sense to afford greater protection to the rights of political parties than to the rights of voters and candidates.") (citation omitted). Since "[p]artisan politics bears the imprimatur only of tradition, not the Constitution," *Elrod* v. *Burns*, 427 U.S. 347, 369 n.22 (1976) (opinion of Brennan, J.), the First Amendment provides no greater protection for the coordinated expenditures of political parties than for those of other private groups.[29]

[28] Petitioners point out (Br. 35) that their coordinated expenditures were for public advocacy, and not merely the symbolic expression of support conveyed by a gift of money. That is equally true, however, of coordinated expenditures made by corporations and unions through their separate segregated funds, and those made by other groups and individuals. In *Buckley*, this Court nevertheless found that the compelling interest in avoiding the appearance of corruption justified regulating coordinated expenditures under the Act's contribution limits. 424 U.S. at 26-29, 46-47 & n.53 (per curiam).

[29] The Founders considered the diversity of interests and views that would result from individual legislators' accountability to separate constituencies to be an essential check against the potential for tyranny by a cohesive and domineering majority in Congress. See *The Federalist* No. 10 (Madison), at 83 (Rossiter ed., 1961). *Cf. Oregon* v. *Mitchell*, 400 U.S. 112, 134 (1970) (opinion of Black, J.) (it is "[e]ssential to the survival * * * of our national government" that "the officials who fill [elective] offices are as responsive as possible to the will of the people whom they represent"). Party leaders have come to exercise substantial influence

2. Petitioners argue (Br. 28, 31-32, 35) that the FECA unconstitutionally discriminates against political parties by imposing limits upon their expenditures more stringent than those applicable to corporations, unions and other political committees. That contention is unpersuasive.[30] Petitioners' attempt (Br. 31) to liken a party

over the voting behavior of party members within the Congress. Whatever the advantages and disadvantages of that influence as a matter of policy, the First Amendment cannot be thought to confer on party officials a constitutional entitlement to acquire the sort of centralized control against which the Founders sought to guard.

Amici Committee for Party Renewal, et al., argue (Br. 24) that "[t]he more a candidate depends on the party [for campaign support], the greater the party's ability to apply its leverage to achieve policy coherence and mobilize party majorities in Congress." These amici further contend (Br. 15) that "[t]he party system, when it operates properly, overcomes the handicaps to governance imposed by the separation of powers." As Madison explained, however, what these amici view as "handicaps" were included in the Constitution for a reason. The Constitution can hardly be thought to require Congress to fashion its legislation so as to facilitate efforts to "overcome" constitutional safeguards.

[30] Petitioners suggest (Br. 6 n.5) that independent groups make independent expenditures far in excess of the coordinated expenditures that party committees are permitted to make under Section 441a(d). In 1986, however—the year in which the violation in this case occured—independent expenditures totaled $10,205,153 nationwide, while the Republican and Democratic party committees throughout the country made a total of $23,317,430 in coordinated expenditures on behalf of party nominees. FEC Press Release, *FEC Final 1985-86 Report On Political Parties Shows Decline In Financial Activity* (May 5, 1988); FEC Press Release, *Final FEC Report On 1985-86 Independent Expenditures Shows Change in Spending Patterns* (Mar. 31, 1988). It should also be noted that the Institute for Legislative Action is, contrary to petitioners' suggestion (Br. 6 n.5), the lobbying arm of the National Rifle Association and is prohibited from making expenditures in connection with federal elections; the NRA's separate segregated fund is called the Political Victory Fund. See *FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 822-823 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). According to its disclosure reports

committee to the incorporated advocacy organization involved in *MCFL* does not advance their argument, for such corporations are entirely prohibited from making contributions and coordinated expenditures. See 2 U.S.C. 441b.[31]

As shown above, the purpose of Section 441a(d) is to permit committees operated by political parties to make coordinated expenditures far in excess of those that can be made by any other entity. See pages 16-17, *supra*. Thus, petitioners could have spent more than $100,000 in opposing Representative Wirth's Senate campaign if they had not assigned that right to the NRSC. See *DSCC*, 454 U.S. at 41 ("The delegation of spending authority is an option, not a requirement, and it is an option resting entirely with the state committees."). Congress also in-

on file with the Commission, the Political Victory Fund made $1,519,349 in independent expenditures in connection with federal elections in 1994. Petitioners' assertion about the amount the AFL-CIO has claimed it intends to spend in 1996 ignores the difference between contributions to candidates and independent expenditures. In 1994, the AFL-CIO's separate segregated fund made only $2,500 in independent expenditures, and the separate segregated funds of all labor organizations spent a combined total of $104,293 on independent expenditures nationwide; however, the AFL-CIO's fund contributed $981,439 to candidates, and labor organization funds contributed a total of $41,867,393 directly to candidates. See disclosure reports of AFL-CIO COPE, on file with the Federal Election Commission; FEC Press Release, *1994 PAC Activity Shows Little Growth Over 1992 Level, Final FEC Report Finds* (Nov. 1995).

[31] *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and *MCFL*, 479 U.S. at 263-264, found a small class of nonprofit, incorporated political advocacy organizations that accept no income from other corporations or unions to be exempt only from statutory limits on *independent* expenditures. In *MCFL*, the Court contrasted the limitation of independent expenditures with the regulation of contributions from political advocacy corporations such as MCFL, *id.* at 259-262, and confirmed that such corporations are subject to the same statutory prohibition on candidate contributions as are other corporations, *id.* at 264 n.13.

cluded other special accommodations to party activities. See 2 U.S.C. 431(8)(B)(v), (x) and (xii), 431(9)(B)(iv), (viii) and (ix), 441a(a)(4).[82] Congress declined, however, to enact a proposed amendment that would have exempted some party committees entirely from the contribution limits. See *DSCC*, 454 U.S. at 35 n.11. Congress thus endeavored to strike an appropriate balance between the prevention of actual or apparent corruption and the desire to "assur[e] that political parties will continue to have an important role in federal elections." *Id.* at 41. This Court should reject petitioners' request to refashion the balance struck by Congress. Cf. *NRWC*, 459 U.S. at 210 (observing that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process' ") (quoting *California Medical Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981)).[83]

[82] In light of those provisions, there is no basis for petitioners' assertion (Br. 23, 27-28) that Section 441a prevents a party committee from mailing letters to its supporters. See also 11 C.F.R. 100.7(b)(15), 100.8(b)(16) (exempting from the definitions of "contribution" and "expenditure" payments made by state parties to distribute brochures or newsletters, if the distribution is done by volunteers rather than commercial vendors and a commercial mailing list is not used).

[83] The petition for a writ of certiorari argued (Pet. 14) that Section 441a(d)'s population-based formula for calculating the coordinated party expenditure limit in each State "refute[s] an 'anti-corruption' purpose." Petitioners appear to have abandoned that argument in their brief on the merits. In any event, the statutory formula reflects Congress's recognition that the expense of campaigning is generally proportional to the number of potential voters in a particular election. The formula preserves a roughly comparable role for political parties in Senate campaigns in each State. Determining the precise level of appropriate contribution limits is a legislative judgment that does not raise constitutional concerns, *Buckley* v. *Valeo*, 424 U.S. at 30 (per curiam), and Congress is not precluded from considering other policy objectives in fashioning the legislation, see *id.* at 36, 84 n.112.

B. The FECA's Restrictions On Coordinated Party Expenditures Also Serve A Compelling Governmental Interest In Preventing Evasion Of The Limits On Individual And Political Committee Contributions

The statutory limitations on coordinated party expenditures also serve a separate compelling interest in preventing circumvention of the $1,000 limit on individual contributions to candidates. See 2 U.S.C. 441a(a)(1)(A). In *Buckley*, the Court found the Act's $25,000 yearly limit on total contributions by an individual to all candidates and political committees to be constitutional even though it imposes "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." 424 U.S. at 38 (per curiam). The Court found that provision to be a permissible "corollary of the basic individual contribution limitation that we have found to be constitutionally valid" because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.* In *California Medical Ass'n* v. *FEC*, 453 U.S. at 198, a plurality of the Court similarly upheld the $5,000 limit on individual contributions to independent political committees, 2 U.S.C. 441a(a)(1)(C), because without it "an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee."

The statutory restrictions at issue here serve a similar purpose. Although individuals can contribute no more than $1,000 to a candidate, they can contribute up to $5,000 to a multicandidate political committee operated by a state political party, and up to $20,000 to a political

committee operated by a national political party. 2 U.S.C. 441a(a). An individual who wished to provide financial support to a candidate in excess of the $1,000 limit might attempt to circumvent that statutory restriction by making a large contribution to that candidate's political party, with the expectation that the party would in turn expend the funds in support of the candidate.

Petitioners suggest (Br. 32) that the fear of such arrangements is "implausible" because the party effectively insulates the candidate from the contributor. Nothing in the Act, however, precludes candidates and officeholders from urging their contributors to make additional contributions to a party committee. Indeed, such solicitation of contributions to party committees by candidates is not unusual.[34] Party committees can, and do, work closely with other political committees in raising funds, and large contributors and fundraisers for a political party may

[34] In entering into a conciliation agreement resolving a set of administrative complaints, the FEC recently agreed that "[t]he [Act] does not prohibit party committees from referring to and promoting party candidates in soliciting funds for the committee and candidates may assist party committees in soliciting funds for the committee." See Conciliation Agreement, Matter Under Review (MUR) 3620, at 4 (¶ IV(11)) (Aug. 21, 1995). See also, *e.g.*, Iver Peterson, *Accepting "Soft Money" As a Necessary Evil*, N.Y. Times, Dec. 29, 1994, at B5 (New Jersey Senator "Lautenberg's office * * * is known to work closely with the state party's fund-raising apparatus"); Tom Kenworthy, *House Democratic Campaign Unit Running Into Turbulence*, Wash. Post, Aug. 2, 1989, at A6 ("The party's new leadership in the House—Speaker Thomas S. Foley (Wash.), Majority Leader Richard J. Gephardt (Mo.) and Majority Whip William H. Gray III (Pa.)—all have committed themselves to active fund-raising roles for the committee."); *Associated Press, Dems: Record Fund-Raising Qtr*, Apr. 19, 1994 ("Boosted by President Clinton's attendance at three major events, the Democratic National Committee raised nearly $10.2 million in the first three months of 1994"); William Presecky, *Mrs. Bush says yes, Clinton no to Du Page*, Chi. Trib., Mar. 12, 1992, at 5 ("all three Democratic candidates seeking the party's nomination for U.S. Senate" were to keynote "the party's fundraiser").

well earn the support of party leaders when their interests are at issue in Congress.[35] Even if a large contribution to a party committee is not specifically earmarked to support a candidate who may have solicited it, the potential for actual or perceived quid pro quo arrangements would be greatly increased if there were no limit on the party's coordinated expenditures. As this Court held in *Buckley*, Congress may act to ensure that the individual contribution limit is not evaded "through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38 (per curiam). See also *Gard* v. *Wisconsin State Elections Board*, 456 N.W.2d 809, 823 (Wis.) ("By placing restrictions on the party-related committee's ability to contribute, the corrupting influence of large contributions to that committee, is diffused."), cert. denied, 498 U.S. 982 (1990). For this additional reason, the FECA's limitation on coordinated expenditures made by political parties does not violate the First Amendment.

C. The Statutory Restrictions On Coordinated Party Expenditures Are Not Unconstitutionally Vague

Petitioners contend (Br. 36-41) that Section 441a(d) is void for vagueness unless it is construed to incorporate an "express advocacy" test. That argument is without merit.

1. As we emphasize above, see pages 16-17, *supra*, Section 441a(d) is not an additional restriction on polit-

[35] "All six national party organizations have formed loose fund-raising alliances with some of the larger and wealthier PACs, and the parties have been successful in getting substantial amounts of money from them. In return for their party support, PAC officials receive regular party briefings, meet informally with powerful representatives and senators, and get introductions and access to other key politicians." Paul Herrnson, *Party Campaigning in the 1980s*, at 45 (1988).

ical party expenditures. Rather, it provides authorization for coordinated party expenditures that would otherwise be prohibited by the Act's limits on contributions. Invalidation of Section 441a(d) on vagueness grounds therefore would not assist petitioners' cause unless the statutory restrictions on contributions were also deemed impermissibly vague. The Court in *Buckley*, however, sustained the contribution limits against a vagueness challenge, see 424 U.S. at 76-78 (per curiam), and petitioners provide no reason for the Court to revisit that holding here.

2. The statutory provisions governing coordinated party expenditures, as construed by the Commission's advisory opinions, provide fully adequate warning as to the nature of the prohibited conduct. People of "common intelligence," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973), would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign contained an "electioneering message." [36] In such circumstances neither the FECA nor the Commission's

[36] Petitioners observe (see Br. 14) that the Commission found probable cause to believe that their expenditure on "Wirth Facts #1" was covered by Section 441a but did not make a similar finding with respect to their expenditures on other advertisements critical of then-Representative Wirth. Petitioners contend (Br. 14-16, 39) that no meaningful difference between the advertisements exists and that the Commission's disparate treatment of them demonstrates the vagueness of the agency's standard. Unlike the other advertisements in question, however, "Wirth Facts #1" expressly linked its criticisms to Wirth's ongoing Senate campaign and explicitly challenged the integrity of Wirth's campaign statements. See Pet. App. 93a-105a; J.A. 147 (at press conference contemporaneous with broadcast of "Wirth Facts #1," Chairman of Colorado Republican Party asserted that Wirth had "purchased television time to baldly misstate his record on two key issues: defense and federal spending"). That distinction is relevant to the question whether the advertisements in question contained an "electioneering message."

construction of it can be found unconstitutionally vague, even if the Act "may leave room for uncertainty at the periphery." *NRWC*, 459 U.S. at 211.

Moreover, the statute provides a procedure for obtaining an advisory opinion from the Commission, see 2 U.S.C. 437f, which enables a party committee to "remove any doubt there may be as to the meaning of the law," *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973), with respect to a proposed expenditure. By "offer[ing] a prompt means of resolving doubts with respect to the statute's reach," Section 437f "mitigates whatever chill may be induced" by the Act. *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 384-385, 386 n.44 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980). The Court in *Buckley* found the advisory opinion procedure insufficient to alleviate the statute's vagueness problems with respect to limitations on independent expenditures; it held that reliance on advisory opinions was "unacceptable because the vast majority of individuals and groups subject to criminal sanctions * * * do not have a right to obtain an advisory opinion from the Commission." 424 U.S. at 40 n.47 (per curiam). As noted in *Martin Tractor*, however, Congress has since amended Section 437f to require the Commission to provide an advisory opinion to any "person," 2 U.S.C. 437f(a)(1), and "the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced." 627 F.2d at 386 n.44.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1996

APPENDIX

The Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, provides in relevant part:

§ 431. Definitions

When used in this Act:

* * * * *

(8)(A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; * * *

* * * * *

(9)(A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; * * *

* * * * *

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

* * * * *

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

* * * * *

(7) For purposes of this subsection—

* * * * *

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or

at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

* * * * *

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal

office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

* * * * *

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FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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---

REPLY BRIEF FOR PETITIONERS

Petitioner Colorado Republican Federal Campaign Committee ("Colorado Party" or "Party") submits this Reply to the Brief for the Respondent Federal Election Commission.

The government does not—and really cannot—dispute that:

- The right of political parties to speak out in connection with federal elections lies at the very heart of the First Amendment.
- By limiting political parties to spending pennies-per-voter in connection with federal elections, § 441a(d) of the Federal Election Campaign Act ("FECA") severely curtails that core First Amendment right.[1]

---

[1] All statutory references are to Title 2 of the United States Code, unless otherwise noted. The government disputes whether

- The purposes reflected in § 441a(d)'s legislative history—to reduce and equalize political speech—are unconstitutional.
- There is no legislative finding or record evidence that limiting political party speech to pennies-per-voter prevents corruption or the appearance of corruption.
- No opinion of the FEC discusses the constitutional issues raised by its vague "electioneering message" standard, nor is the FEC entitled to deference on constitutional matters.
- The district court correctly found that "Wirth Facts # 1" was not "express advocacy."

The government and its supporting amici assert that political parties must be muzzled to prevent actual corruption or the appearance of corruption. The justification for such restrictions, however, has not been established.

I. THE GOVERNMENT HAS NOT ESTABLISHED THAT PARTY SPENDING LIMITATIONS ARE NECESSARY TO ACHIEVE A COMPELLING INTEREST AND ARE NARROWLY TAILORED TO THAT INTEREST.

The government cannot meet its heavy burden of justifying an infringement on core First Amendment rights by merely "posit[ing] the existence of the disease" called political corruption. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1016 n.18, 1017 (1995) (noting record evidence produced by government). Instead, it must show that the alleged harms are real, and that the statute directly alleviates those harms. *Id.* Moreover, it must show that the statute is narrowly tailored and that less drastic measures will not suffice. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) (*"NCPAC"*); *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The government's defense here does not meet these standards.

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the party-spending limit is imposed by § 441a(d), but does not dispute the existence or severity of the limit.

A. Party Spending Limitations Are Not Necessary To Prevent Corruption Or The Appearance Of Corruption.

The government speculates (Br. 34) that party leaders might use party spending to corrupt candidates for the leaders' private financial benefit.[2] However, it offers no evidence that this has been a problem or that the potential injury is of a sufficient magnitude to justify sharply restricting the Colorado Party's fundamental First Amendment rights.[3]

---

[2] Contrary to the government's assertion (Br. 40 n.33), the Colorado Party has not "abandoned" its argument that the population-based expenditure formula under § 441a(d) belies an anti-corruption purpose. As demonstrated by limits recently announced by the FEC, the parties are permitted to spend $1,409,249 in connection with 1996 Senate races in California, but only $170,932 in Colorado. *See* FEC 22 *Record* 4 at 15 (Apr. 1996) If the underpinning of § 441a(d) were really that political party speech "corrupts" candidates, it stands to reason that such corruption would be taking place on a massive scale in California and other large states today.

[3] The government identified no evidence that modern political parties are actually corrupt or have the appearance of corruption. Amicus Common Cause (Br. 16) erroneously alleges that the Watergate Special Prosecution Force ("WSPF") found corruption between the Republican party and ITT Corporation. In fact, the WSPF investigation of ITT resulted in two criminal cases and neither included allegations of party corruption. *See* Watergate Special Prosecution Force Report 60 (Oct. 1975). The fact remains that the government has produced absolutely no evidence of modern political party corruption.

The two cases cited by the government for the proposition that parties can corrupt are far removed from this case. Justice Stevens' dissent in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), addressed the potential for corruption through patronage practices, and *Igneri v. Moore*, 898 F.2d 870 (2d Cir. 1990), concerned financial disclosure requirements for state employees. In neither case were the speech rights of parties at stake.

Contrary to the Respondent's argument (Br. 32 n.22), the legislative history of FECA contains evidence concerning the corruptive potential of large family-member contributions. *See, e.g.*, 119 Cong. Rec. S14724 (daily ed. July 25, 1973); Brief of Common Cause in *Buckley v. Valeo*, 424 U.S. 1 (1976), at 73.

Unable to show any *quid pro quo* abuses involving modern political parties, the government (Br. 35) defines as "corrupt" anyone "who seeks to exercise 'coercive influence' over the formulation of public policy [even if] motivated solely by a concern for the common good." By "coercive influence" the government means threatening to withhold party support. This argument assumes that parties have a duty to support candidates with whom they disagree. But refusing to speak out in favor of a candidate with whom one disagrees is not "corruption," it is democracy. *See* Brief of American Civil Liberties Union, at 14-17.

The government's new definition of corruption would condemn much classic democratic activity. Granting or withholding editorial support, endorsements, grassroots organizing and the like all are "coercive" in this sense. As this Court has repeatedly emphasized, "corruption" sufficient to justify infringing core political speech must involve "the financial *quid pro quo*: dollars for political favors," or at least the appearance of such corruption. *See NCPAC*, 470 U.S. at 497; *see also Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). In fact, the broad "corruption" rationale now suggested by the government is merely a euphemism for the impermissible goals of reducing and equalizing political speech.[4]

B. Party Spending Limitations Are Not Necessary To Prevent Circumvention Of The Candidate Contribution Limits.

The government also speculates that limiting political party speech is necessary to prevent evasion of FECA's

[4] The amicus brief submitted on behalf of various states ("States' Brief") naturally expresses an interest in protecting "the integrity of the electoral process" in those states. *See* Br. 10-16. Despite the important constitutional difference between an expenditure *by* a political party and a contribution *to* a party, however, the States' Brief analyzes only the effect of large contributions allegedly prevalent in some states. This analysis is wholly irrelevant to the party spending limits at issue here.

limits on contributions to candidates. This is inconsistent with FECA's legislative history, which shows that the party limits were intended to complement the restrictions on expenditures that this Court struck down as unconstitutional attempts to reduce and equalize speech. *See* Colorado Party Opening Brief at 26-27.

Moreover, the government's theory ignores the stringent limitations that FECA imposes on contributions to parties for use in federal elections. As is discussed in the Colorado Party's Opening Brief (at 5), those contributions can come only from individuals and registered committees, are limited in amount, and cannot be earmarked for a particular candidate without counting as a direct contribution to that candidate (§ 441a(a)(8)). Thus, the most that the government can hypothesize (Br. 42) is that an individual "might" have an "expectation" that his or her publicly disclosed, limited contribution to a political party ultimately would benefit a candidate. Such an attenuated relationship resulting from multiple political support is not a compelling or even legitimate interest warranting a limit on the political speech of parties to pennies-per-voter.[5]

[5] Amicus Common Cause argues (Br. 10-11) that party spending limits are necessary to prevent Senate candidates from becoming beholden to donors who, notwithstanding § 441a(a)(8), can contribute up to $120,000 ($20,000 per year) to a national party during a candidate's six-year term in addition to the $2,000 statutory maximum to the candidate. This argument is misleading on several levels. First, individuals may not contribute $20,000 per year to a state political party like the Colorado Party. *See* § 441a(1)(C) (limiting annual contributions to $5,000). Second, individuals are limited to making $25,000 in total contributions to campaigns, PACs and party committees in any given year. § 441a(a)(3). Therefore, although an individual may contribute up to $20,000 per year in unearmarked funds to a national party, the individual would consequently be limited to contributing $5,000 to *all* other parties, PACs, and campaigns. Further, Common Cause ignores the impact of inflation on FECA's party-spending limits during the last two decades. In 1974 dollars, the Colorado Party's $5,000 contribution limit is worth only $1,618.12 today; the $20,000 limit to national parties is worth only $6,472.48. *See* FEC 22 *Record* 4 at 15 (Apr.

C. Amici Theories About "Soft Money" Are Unfounded And Irrelevant.

Recognizing that the contributions that parties can accept for federal purposes are too restricted to pose any risk of corruption, amici suggest that so-called "soft money" could provide an avenue for corruption.

"Soft money" is a nonlegal term that refers to funds that, by definition, are not and lawfully may not be used in connection with federal elections. *See* 11 C.F.R. § 106.5. These funds are not "contributions" or "expenditures" under FECA but are subject to state regulation.[6]

The government has not embraced amici's "soft money" theory. None of the funding for "Wirth Facts # 1" was "soft money." Nor, despite imaginative references by the Brennan Center for Justice (Br. 7, 10) to "bleeding" of "soft money" into federal campaigns, (which is illegal) is there any evidence that "soft money" is used for federal election purposes. The strict accounting required by FECA, *see* 11 C.F.R. §§ 102.5 & 106.5, makes such "bleeding" highly unlikely.

Amici's theory is that large donations of soft money can be used to addict a political party. The amici speculate that, once the party is addicted, the donor then can use the threat of withholding "soft money" to induce the party to spend additional "hard money" to support a particular candidate. Amici hypothesize that, when the candidate is informed of this, he or she will confer improper benefits on the "soft money" donors. Obviously, this supposed route to corruption is exceptionally attenuated and inefficient.

More importantly, amici's theory ignores the fact that, regardless of the outcome of this case, the total amount

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1996). Finally, Common Cause did not cite a single example of such a contribution pattern in the 20 years of FECA.

[6] So far as the Party can determine, several of the six states joining in the States' Brief do not limit party speech.

of party speech in federal elections—the supposed vehicle for "soft money" corruption—will remain constrained by the parties' ability to raise money under FECA's existing contribution limits. Such contributions are the *only* lawful source for party expenditures in federal elections. "Soft money" does not corrupt federal candidates, and if it did Congress and/or the states would have to regulate it directly in a constitutional manner before limiting party speech.[7]

II. THE § 441a(a)(2) CONTRIBUTION LIMITATION, EMPHASIZED FOR THE FIRST TIME IN THE GOVERNMENT'S BRIEF, DOES NOT GOVERN THIS CASE.

For the first time in this proceeding, the government asserts (Br. 14-16) that this case is governed not by the expenditure limits of § 441a(d)(3), but by the contribution limits of § 441a(a)(2). Remarkably, during the last ten years no FEC pleading, memorandum, or brief relied upon § 441a(a)(2); none of the lower court opinions analyzed this case under § 441a(a)(2); and none of the amicus briefs supporting the government discuss § 441a (a)(2). In truth, § 441a(a)(2) is a red herring.

A. The Colorado Party's Counterclaim Addresses Only § 441a(d).

Party expenditures in connection with federal elections are regulated *only* by § 441a(d), not by § 441a(a)(2) or any other provision. Section 441a(d)(1) provides:

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[7] Nor is there any validity to the argument pressed in the States' Brief (2-3, 24-25) that striking down party spending limits would "eviscerate" public financing of elections. Any ruling in this case will apply only to limits upon party spending in U.S. House and Senate races, where no public financing system exists. But even if party-spending limits were invalidated for those elections with public financing, both the federal and state governments have viable methods—many already in place—to check any potentially corruptive influence of contributions to the parties. Obviously, protecting public funding systems cannot justify limiting party speech to the extent the goal of such public funding schemes is to reduce and equalize speech.

> *Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions,* the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) or (3) of this subsection. (emphasis added)

The Party's counterclaim seeks a declaratory judgment "that the limits on its expenditures in connection with the general election campaign . . . imposed by 2 U.S.C. § 441a(d) are unconstitutional. . . ." J.A. 68. It alleges that the Colorado Party "could and would have made expenditures directly in connection with the general election . . . that exceeded the limits established by 2 U.S.C. § 441a(d), but for the deterrent and chilling effect" of those limits. *Id.* Thus, solely at issue in the Party's counterclaim is the right to speak by making expenditures governed by § 441a(d).

The Colorado Party's counterclaim attacks only the *limits* imposed by § 441a(d), and it does so on the grounds that those limits improperly restrict the ability of political parties to communicate with their members and the public. Holding that the limits imposed by § 441a(d) unduly restrict party expenditures could not possibly support imposing even more stringent limits under § 441a(a)(2). In sum, § 441a(a)(2) has nothing to do with the Colorado Party's counterclaim.

B. The Government's Complaint Similarly Rests On The Claim That Expenditures For "Wirth Facts #1" Exceeded The Limits Of § 441a(d), Not § 441a(a)(2).

The FEC's enforcement action also stands or falls on the claim that the expenditures for "Wirth Facts #1" were "in connection with" a federal election and, hence, violated the limits established by § 441a(d). The probable cause finding that authorized this lawsuit accepted the recommendation of the FEC General Counsel to find a violation of § 441a(d). *See* FEC General Counsel's Brief, Matter Under Review 2186 (Nov. 6, 1987). Likewise, the probable cause letter that the FEC sent to the Party pursuant to the statutorily mandated conciliation process gave notice of a claimed violation of "the Act's limits at § 441a(d)." J.A. 181-84. Neither asserted a violation of § 441a(a)(2).

The FEC's district court complaint does not even mention § 441a(a)(2), but instead relies upon a claimed violation of § 441a(d). J.A. 51-60. The Colorado Party's Answer pleaded that the Party "has not violated 2 U.S.C. § 441a(f) because its disbursements for 'Wirth Facts #1' are not subject to 2 U.S.C. § 441a(d) limits." J.A. 67. The papers before the trial court and the court of appeals all treated as determinative the issue of whether the expenditures were "in connection with" a federal election within the meaning of § 441a(d), and both lower courts proceeded on that theory.

C. The Government's New Interpretation Of FECA Is Inconsistent With The Language Of The Statute And Its Implementation.

Not only is the government's argument that the Colorado Party violated § 441a(a)(2) new to this litigation, but that view has no basis in law. The text, structure, and historical application of FECA make clear that political party speech—regardless of its content—never implicates § 441a(a)(2)'s contribution limits. Speech by a party is limited, if at all, only by § 441a(d). The government's assertion that § 441a(a)(2) applies to party speech seeks to paint this case as one concerning contributions rather than expenditures in order to avail itself of the lower constitutional scrutiny afforded contributions in *Buckley*.[8]

[8] The government's use of this distinction is unduly formalistic. The First Amendment does not speak of "contributions" as less

FECA contemplates three categories of political party spending, each with its own legal ramifications. First, where a party transfers money or some other tangible thing directly to a candidate, that transfer is treated as a "contribution." § 431(8)(A). Like any other political committee, a political party is permitted to make only $5,000 in such contributions per election under § 441a (a)(2). Second, where a party makes an expenditure "in connection with" a federal election without providing any direct transfer to the candidate, that "expenditure" is subject to the limits of § 441a(d) ($103,248.54 for the 1986 Colorado Senate race). Finally, where a political party does not make a direct transfer to a candidate and does not make an expenditure "in connection with" a federal election, FECA imposes no limit at all.

The government's new litigation position—never adopted by the FEC or even advocated below—is that the first two of these categories are exactly the same (Br. 4 n.6 & 18 n.15) and that § 441a(d) merely authorizes additional "contributions." The government's view is based upon two provisions: (1) § 441a(a)(7), which generally treats an expenditure made in coordination with a candidate as a contribution to the candidate; and (2) 11 C.F.R. § 110.7(b)(4), which provides that expenditures by a party in connection with a federal election cannot be "independent expenditures."

Speech by a party, however, is *never* a "contribution" to a candidate. Section 441a(a)(7), "a provision of law with respect to limitations on contributions," simply does not apply to political parties by operation of § 441a (d)(1), which states:

> Notwithstanding any other provision of law with respect to . . . limitations on contributions, . . . a

protected than "expenditures." The Court in *Buckley* relied on the differing functions and characteristics of the types of disbursements before it. Regardless of how labelled, party speech under § 441a(d) has the essential characteristics of expenditures. *See* Colorado Party Opening Brief at 35-36.

> State committee of a political party . . . may make expenditures in connection with the general election campaign of candidates for Federal office . . . .

Thus, party "expenditures" are *not* subject to "contribution" limits.[9]

Recognizing this clearly expressed intent of Congress, the FEC has previously stated that § 441a(a)(2) does not apply to communications by the parties. FEC regulations provide that expenditures under the pennies-per-voter formula of § 441a(d)(3) "shall be in addition to any contribution by a committee to the candidate permissible under § 110.1 or § 110.2 [which implement the contribution limit]." 11 C.F.R. § 110.7(b)(3).

The view that party contributions are distinct from party expenditures has also been recognized in FEC Advisory Opinions—which the government treats as precedent. For example, FEC Advisory Opinion 1989-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 5973 (1989), notes that:

> *Such limited expenditures may be made in consultation and cooperation with the candidates, but are not considered contributions to them.* See 2 U.S.C. § 441a(a)(7)(B) and 11 C.F.R. 110.7(b)(3), (b)(4). In addition, these limited expenditures may be made "[n]otwithstanding any other provision of law with respect to limitations on expenditures. . . ." 2 U.S.C. § 441a(d)(1).

[9] The Respondent in this Court apparently presumes that the Party asks for *all* of § 441a(d) to be declared unconstitutional. Throughout this litigation, however, the Colorado Party has argued only that the *limits* imposed by § 441a(d) on spending for Senate elections, found in subsection (3), violate the First Amendment. *See* Defendants' Answer and Counterclaims, J.A. 68 ("The State Party seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that the limits on its expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U.S.C. § 441a(d) are unconstitutional. . . .").

Id. at 11,582 (emphasis added). *See also* FEC Advisory Opinion 1980-103, Fed. Election Camp. Fin. Guide (CCH) ¶ 5557 (1980) (while "moneys disbursed to the individual congressional candidates are contributions from the State party . . . subject to the $5,000 contribution limit," the party may also make expenditures "in connection with the general election" within the limits of § 441a(d)(3)).

In fact, FEC Advisory Opinion 1985-14, from which the government discerns its § 441a(a)(2) analysis, supports the same conclusion. Though the party speech at issue in Advisory Opinion 1985-14 was remarkably similar to the speech at issue here, *that opinion addressed only the application of the expenditure limitations in § 441a(d)(3).* While the opinion also considered whether the expenditures would be "attributable" to certain candidates under 11 C.F.R. § 106.1(a), the attribution analysis referred to allocating the costs of general anti-Republican advertisements to the *party expenditure limits* (*i.e.*, under § 441a(d)(3)) for the particular Democratic candidates who would benefit from the advertisements. J.A. 274. This analysis had absolutely nothing to do with the contribution limits of § 441a(a)(2). In fact, the Advisory Opinion specifically notes (J.A. 273 n.5) that the "expenditure" limits are "in addition to the limitation on contributions by DCCC pursuant to 2 U.S.C. § 441a(a)(2)(A)."

One simply cannot speak intelligibly of coordination between political parties and candidates. Because candidates are nominated by and are members of parties and because the very purpose of parties is to support candidates, they have no choice but to coordinate.[10] This does not mean, however, that political parties and candidates

[10] Because § 441a(d)(1) specifically exempts political parties from this "coordination" inquiry, this case will have no effect on application of the coordination inquiry to other entities such as PACs, labor unions, and corporations, which are not covered by § 441a(d)(1). The government's statement to the contrary (Br. 22) does not take this distinction into account.

have identical political views or that parties have nothing to say about public issues other than what candidates may say. To the contrary, parties are vitally interested in public issues and Congress assumed that parties would speak, both on issues and candidates, without being deemed to have made a "contribution." Indeed, the government acknowledges (Br. 3) that at the very least "generic" speech is "not subject to the Act's contribution limits," nor is party speech that does not contain an "electioneering message."

III. THE GOVERNMENT UTTERLY FAILS TO ADDRESS THE SIGNIFICANT VAGUENESS CONCERNS ASSOCIATED WITH THE FEC'S "ELECTIONEERING MESSAGE" STANDARD.

The government contends (Br. 44-45) that "people of common intelligence" would have no difficulty understanding that "Wirth Facts #1" contains an "electioneering message." Beyond that conclusory statement, however, the government fails to provide any definition of its "electioneering message" standard or to offer any meaningful distinction between "Wirth Facts #1" and the Colorado Party's other radio ads and pamphlets. These failures demonstrate in and of themselves that the construction of § 441a(d)(3) advocated by the government is unconstitutionally vague.

FEC v. Massachusetts Citizens for Life, Inc. ("*MCFL*"), 479 U.S. 238 (1986), held that the First Amendment requires § 441b(a)'s prohibition on corporate expenditures "in connection with" a federal election to be limited to "express advocacy" as defined in *Buckley*. Using identical language, § 441a(d)(3) forbids the Colorado Party from making any expenditures "in connection with" a federal election that exceeds a pennies-per-voter limit.

The government concedes (Br. 9 & 25-26) that its "electioneering message" standard is broader than the

"express advocacy" test.[11] The government cites no evidence that Congress intended the "in connection with" language of § 441a(d) to have a different meaning than its statutory twin in § 441b(a), nor does it deny that a narrowing construction of § 441a(d) is compelled by the First Amendment. Nevertheless, the government urges this Court to adopt an unconstitutionally vague "electioneering message" standard that, so far as appears, the FEC formulated without discussion or even awareness of First Amendment standards.[12] In so doing, the government offers no reason why political parties are entitled to less clarity than corporations.[13]

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[11] The government declined to appeal the trial court's ruling that "Wirth Facts #1" was not "express advocacy." *See* Colorado Party Opening Brief at 3 n.3. The Colorado Party's Opening Brief (40-41) demonstrated that while the government represents (Br. 3) that generic appeals such as "Support Republicans for Congress" are not subject to FECA's contribution limits, the FEC has sought to expand the scope of the "express advocacy" test. Ignoring this Court's bright-line test, the Commission has determined:

> [M]essages such as "Vote Democratic" or "Vote Republican" will be evaluated on a case-by-case basis to determine whether they constitute express advocacy under the criteria set out in 11 CFR 100.22(b).

J.A. 251. Such a free-wheeling approach is contrary to this Court's teachings.

[12] None of the advisory opinions on which the government relies for the "electioneering message" standard even mention the First Amendment. The government has pointed to no other authority for its standard.

[13] The government's reliance (Br. 21-22) upon post-*Buckley* amendments to FECA to argue that Congress actually supports the "electioneering message" standard is unpersuasive. While Congress did not change the scope of § 441a(d)(3) at the time it defined "independent expenditures" to require "express advocacy," there is an obvious explanation. Congress created a new definition for "independent expenditures" because *Buckley* ruled that such a limiting construction was required by the Constitution. Because *Buckley* did not address the constitutionality of § 441a(d)(3) under the First Amendment, there was no Supreme Court ruling to codify.

Nor do the post-*Buckley* amendments support the government's contention (Br. 30-31 n.21) that § 441a(d)(3) has an anti-corruption purpose. The government has cited no congressional finding or concern that parties are corruptive.

The government claims (Br. 44-45) that people of "common intelligence" usually will be able to determine whether particular speech contains an "electioneering message," and that an FEC advisory opinion is available where the standard is unclear. It asserts that this is sufficient under *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). This argument fails at several levels.

First, *Buckley* expressly rejects a standard of "adequate notice to a person of ordinary intelligence," holding that "[w]here First Amendment rights are involved, *an even 'greater degree of specificity' is required*." *Id.* at 77 (emphasis added). Thus, the level of clarity that the government claims for its "electioneering message" standard is legally inadequate.

Second, the government's "electioneering message" standard blurs the critical distinction between advocacy of issues and advocacy of candidates. The core concern of the "express advocacy" test is to assure that issue advocacy is not chilled, even if some candidate advocacy must be allowed. *See MCFL*, 479 U.S. at 249 (discussing and applying the *Buckley* "express advocacy" test). As was explained in a recent opinion striking down the FEC's rulemaking attempt to import an electioneering message concept into the express advocacy test:

> [Under *Buckley* and *MCFL*,] FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues. . . . The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited.

Maine Right to Life Comm. v. FEC, 914 F. Supp. 8, 12 (1996) (invalidating 11 C.F.R. § 100.22(b)(2)).

The inherent difficulties with the government's "electioneering message" standard are starkly illustrated by the facts of this case. The Colorado Party's radio and print materials all discussed issues raised by the conduct of the same incumbent Congressman, Timothy E. Wirth. They were disseminated at the same time and shared a common objective. All were identified as coming from the Party. Yet only "Wirth Facts #1" is said to embody an "electioneering message."[14]

The government argues (Br. 45) that any vagueness concerns relating to the "electioneering message" standard are remedied through the FEC's advisory opinion process. This argument is untenable. This Court has never held that a scheme of advance licensing of political speech cures an unconstitutionally vague standard. Nor is such a scheme practical in this context. Political discourse is immediate and fluid, while the FEC may take up to 60 days to issue an advisory opinion. 11 C.F.R. § 112.4(a). By the time the need for FEC advice is perceived, a request for an advisory opinion is prepared, and the FEC issues an opinion, the vital political moment often will have passed.

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[14] In the lower courts the government was unable to suggest any basis for distinguishing "Wirth Facts #1" from the Colorado Party's other similar ads and brochures. *See* Colorado Party's Certiorari Reply Brief at 3. In this Court the government offers two grounds of distinction (Br. 44 n.36). First, it says that only "Wirth Facts #1" "expressly" referred to Wirth's Senate Campaign. Yet the others ads and brochures also referred to statements then being made by the Wirth Campaign. Second, the government cites a press statement (J.A. 147-48) by the Colorado Party's Chairman. It never explains why that statement matters, but the statement applies equally to all of the Party's ads. The government cannot claim that a reasonable person, knowing that "Wirth Facts #1" would be condemned, confidently could conclude that the other ads and pamphlets would be permissible. An express advocacy standard would permit such a judgment.

Moreover, the entire exercise can be for naught. In this case, for example, aside from "Wirth Facts #1," the FEC divided three-to-three over whether the Colorado Party's other advertisements contained an "electioneering message." Four votes are needed to issue an advisory opinion. 11 C.F.R. § 112.4(a). Thus, if the Party had sought an advisory opinion here, it would have lost 60 days and gained no clarity. This is not an isolated example; the FEC regularly deadlocks in close cases.[15] Needless to say, close cases are when an advisory opinion would be most useful.[16]

As the Colorado Party Chairman testified:

> A political party is designed to do a lot of things. Among them is to help candidates . . . . For federal candidates, which come under the FEC, there are rules that to the average nonlawyer state chairman are so complex and so difficult *that many people just say I just won't play in that league.*

J.A. 215 (emphasis added). The government's regrettable adherence to the vague "electioneering message" standard compounds the problem, and the FEC has given no indication that it recognizes the serious constitutional concerns that this creates.[17] In order not to be unconstitu-

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[15] *See, e.g.*, FEC Advisory Opinion 1985-14, J.A. 267-74 (deadlocking on whether an advertisement critical of the Reagan Administration's defense spending contained an "electioneering message" where the ads closed by saying "Vote Democratic").

[16] The government also asserts (Br. 43-44) the *non sequitur* that the "electioneering message" standard is appropriate because § 441a(d) is "not an additional restriction." The Colorado Party rejects the government's peculiar view that a political party has no right to speak absent an act of grace by Congress. But even if the government's premise were true, the Party still would be entitled to clear guidance as to what speech is permitted and what is not.

[17] The government apparently does not dispute that courts may not defer to agency rulings which, like the "electioneering message" standard, raise serious constitutional concerns and conflict with Supreme Court precedent. *See* Colorado Party's Opening

tionally vague, § 441a(d) must be limited to communications that satisfy this Court's bright-line "express advocacy" test.[18]

CONCLUSION

The First Amendment interests implicated by this case are profound.[19] A political party is nothing more than a group of people associated to promote public policies they believe in. They adopt a name for their group and hold themselves out to the public under that name. In order to promote their beliefs effectively, they nominate one of their own members for public office and support that individual's campaign with the expectation that the nominee will advance their shared beliefs. To deprive parties of

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Brief at 41-46. Indeed, the only case cited by the government in support of deference being afforded to the FEC is *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981), in which the agency's decision not to prosecute actually expanded First Amendment rights. Conspicuously absent from the government's brief is any discussion of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, contrary to the government's assertion (Br. 25 n.19), the Colorado Party did argue below that the FEC's advisory opinions did not merit deference. *See* Colorado Party Certiorari Reply Brief at 2 n.2.

[18] Even if § 441a(d)(3) is limited to "express advocacy," the Colorado Party's facial challenge to the political party spending limits would remain. The Party seeks to vindicate its constitutionally protected right to engage in unlimited express advocacy.

[19] As noted in the Colorado Party's Opening Brief (at 3), § 441a(d) does not even permit the Party to pay to send one first-class mailing to every party member in Colorado. While the government correctly notes that parties may distribute certain materials to members if accomplished through "volunteer activities" (Br. 40 n.32), FEC regulations are so complex and restrictive as to make it often impractical for parties to comply. *See, e.g.*, J.A. 215. For instance, the regulations do not permit mailings to be accomplished by commercial vendors or from lists maintained by commercial vendors, which are the most cost-effective means of reaching members and voters. As the Chairman of the Colorado Party testified (J.A. 215), the difficulty of interpreting what constitutes "volunteer activity" also leads many parties to avoid relying upon the "volunteer activity" exception altogether.

the right to advocate expressly the election of their candidates robs them of their very purpose for being.

In ruling on campaign finance laws in the last 20 years, this Court has shown a sensitivity to such weighty interests. For instance, while recognizing that expenditures and contributions both implicate core First Amendment rights, the Court has given heightened scrutiny to expenditure limitations because of their more significant impact on speech. While limiting the ability of unions and business corporations to influence elections, the Court has consistently safeguarded the rights of individuals, candidates, PACs and other political organizations to speak without limit on electoral issues.[20]

What the Colorado Party seeks is a similar sensitivity to its interests. Though the government's novel contribution analysis tries to obscure the issue, there remains one principle at the core of this case: political party spending limitations, no matter how they are implemented, silence

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[20] Even unions and business corporations have wider latitude to engage in unlimited speech than do political parties, as they may communicate to the general public so long as that speech falls short of "express advocacy," and is not coordinated with any federal candidate. *See MCFL*, 479 U.S. at 249. Moreover, while a party may not even send one letter to each of its members without violating § 441a(d), there is no limit upon a union's use of compulsory dues to communicate with its members, regardless of whether the communication is "express advocacy," and regardless of whether the communication is coordinated with candidates. *See United States v. Congress of Industrial Org.*, 335 U.S. 106 (1948). As noted in the Colorado Party's Opening Brief (at 6-7 n.5), the AFL-CIO has recently announced a $35 million campaign targeting candidates for the House of Representatives, which will be financed by a mandatory assessment on all member unions regardless of whether individual members prefer those candidates. *See* Frank Swoboda & Thomas Edsall, "AFL-CIO Endorses Clinton, Approves $35 Million Political Program," *Washington Post*, Mar. 26, 1996, at A6. This unlimited spending is in *addition* to the spending by the separate segregated fund of the AFL-CIO noted in the government's brief.

vital political speech for no discernable purpose. As such, they are unconstitutional.

* * * *

For the reasons stated herein and in the Colorado Party's Opening Brief, the Party respectfully requests that the judgment below be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, FAIR GOVERNMENT FOUNDATION, ALLIED EDUCATIONAL FOUNDATION; U.S. SENATORS ALFONSE M. D'AMATO, MITCH McCONNELL; U.S. REPRESENTATIVES HENRY J. HYDE, BOB LIVINGSTON, JOE BARTON, BOB WALKER; BILL FRENZEL AND EUGENE McCARTHY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-489

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, et al.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, FAIR GOVERNMENT FOUNDATION, ALLIED EDUCATIONAL FOUNDATION; U.S. SENATORS ALFONSE M. D'AMATO, MITCH McCONNELL; U.S. REPRESENTATIVES HENRY J. HYDE, BOB LIVINGSTON, JOE BARTON, BOB WALKER; BILL FRENZEL AND EUGENE McCARTHY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The **Washington Legal Foundation** (WLF) is a national non-profit public interest law and policy center based in Washington, D.C., with over 100,000 supporters nationwide. WLF engages in litigation and the administrative process in a variety of areas of constitutional and statutory law. In particular, WLF has filed numerous briefs in this and lower courts advocating a strong and robust protection of the First

Amendment in the political and commercial context. *See, e.g., Meyer v. Grant,* 486 U.S. 414 (1988); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990); *Cincinnati v. Discovery Network, Inc.,* 113 S.Ct. 1505 (1993); *Rubin v. Coors Brewing Co.,* 115 S.Ct. 1585 (1995).

The **Fair Government Foundation** (FGF) is a non-profit, non-partisan organization that conducts research and public education on campaign finance and election law issues. Established in 1994 and chaired by U.S. Senator Paul Coverdell, FGF seeks to prevent government encroachment on constitutional liberties, to preclude improper governmental interference in the political process, and to serve as a "watchdog" of the Federal Election Commission.

The **Allied Educational Foundation** (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education and study in law and public policy. AEF has appeared before this Court as an amicus curiae along with WLF in numerous cases and shares WLF's interests.

U.S. Senator **Alfonse M. D'Amato** is a duly elected Senator from New York. In addition to his legislative duties, including serving as Chairman of the Senate Banking Committee, Senator D'Amato is Chairman of the National Republican Senatorial Committee. U.S. Senator **Mitch McConnell** is a duly elected Senator from Kentucky, and Chairman of the Senate Select Committee on Ethics.

U.S. Representative **Henry J. Hyde** of Illinois is Chairman of the House Judiciary Committee; U.S. Representative **Bob Livingston** of Louisiana is Chairman of the Appropriations Committee; U.S. Representative **Joe Barton** of Texas is Chairman of the House Subcommittee of Oversight and Investigation of the House Commerce Committee; and U.S. Representative **Robert S. Walker** of Pennsylvania is Chairman of the Science Committee.

Bill Frenzel is a former U.S. Representative from Minnesota who served in office from 1971 to 1991. During his tenure, Mr. Frenzel was a leading advocate and expert in ethics and campaign finance reform. In 1974, he introduced a bill to create the Federal Election Commission, but subsequently became a critic of the FEC's repressive actions. **Eugene McCarthy** is a former U.S. Senator from Minnesota and former presidential candidate whose campaign committee was a plaintiff in *Buckley v. Valeo,* 424 U.S. 1 (1976). Senator McCarthy has long been a vocal critic of the Federal Election Commission's suppression of First Amendment rights.

All the amici believe that 2 U.S.C. § 441a(d)(3), which limits state party committee expenditures, is an unconstitutional relic of the Federal Election Campaign Act following the *Buckley* decision. In addition, it has been interpreted and enforced by the FEC in an arbitrary and unconstitutional manner. Enforcement of this provision also perversely forces elected officials to spend more time raising funds from private sources rather than being able to rely more on the support of their respective party organizations in the form of party expenditures, such as the political speech at issue in this case.[1]

SUMMARY OF ARGUMENT

Political parties engage in core First Amendment political speech, but suffer unconstitutional debasement by the Federal Election Campaign Act of 1971, as amended, (2 U.S.C. § 431 *et seq.*) (the "Act"), and Federal Election Commission ("FEC" or the "Commission") regulations. By federal fiat, but contrary to fact or common sense, political parties are deemed incapable of making "independent expenditures," and therefore subject to rigorous and unconstitutional limitations on vital First Amendment

[1] Letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

freedoms. Amici contend that the limitations on party expenditures for political speech are unconstitutional, regardless of whether such expenditures are called "independent" or "coordinated." If, however, the Act survives strict scrutiny, it must at least be strictly construed, and the Federal Election Commission unambiguously instructed to limit its enforcement to the "express advocacy" standard originally set forth by this Court in *Buckley v. Valeo*, rather than the vague and subjective "electioneering message" standard the FEC has adopted.

ARGUMENT

The Colorado Republican Federal Campaign Committee ("Colorado Committee") publicly criticized an elected official's voting record on defense spending and a balanced budget. Such political criticism would seem, in its modest way, to vindicate the highest aim of the First Amendment, and thus exceed the reach of government control.

> Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. * * * Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). The Colorado Committee's political speech might have been commended as vindicating "a fundamental principle of the American government." Instead it was prosecuted by the Federal Election Commission ("FEC"), and subject to suppression, civil fines, and this decade of litigation.

I. AS THIS CASE ILLUSTRATES, POLITICAL PARTIES ENGAGE IN CORE FIRST AMENDMENT POLITICAL SPEECH THAT IS UNCONSTITUTIONALLY BURDENED BY THE FEDERAL GOVERNMENT.

A. When Political Parties Criticize Government Officials and Debate Public Issues, They Vindicate the Highest Aims of a Deliberative Democracy.

The value of public debate itself is not debatable. All rally around our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, "[i]nformation relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).[2]

Political parties should be solaced by the First Amendment's protection of their most fundamental activities—open criticism of public officials and the dissemination of political information. "To punish the exercise of this right to discuss public affairs or to penalize it ... is to abridge or to shut off discussion of the very kind most needed." *New York Times Co. v. Sullivan*, 376 U.S. at 297 (Black, J., concurring). But as this case illustrates, political parties suffer special burdens on "discussion of the very kind most needed." *Id.* The Colorado Committee's criticism of Tim Wirth's voting record included 19 words that the federal government examined and sought to suppress: "Tim Wirth,"

[2] *See also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) (same).

said the Colorado Committee, "has a right to run for Senate. But he doesn't have a right to change the facts."

The First Amendment offense at issue in this case perhaps has little of the crudeness—of either speech or state reaction—that inspired hallmarks of First Amendment jurisprudence.[3] The Colorado Committee's speech does not arouse alarm that its unpopularity might have been the primary reason for its suppression. Indeed, the Colorado Committee was rather gracious, and the FEC's response rather mechanical. But therein lies perhaps a graver threat than the crudeness that inspires such exacting judicial solicitude. Here, the motive for the First Amendment offense seems worthy. At stake, theoretically, is the integrity of our elections and our representative democracy. Some erosion in the integrity of the First Amendment may seem a tempting trade. If that instinct be detected, then a trenchant scrutiny becomes so much more important—lest the First Amendment lose by default rather than demonstrated necessity.

B. The FEC Illogically Condemns Political Parties to "Arm of the Candidate" Status, Even If No Candidate Exists, and Thereby Cripples Political Parties' Ability to Engage in Core First Amendment Speech.

The inquiry is not whether an entity has the same First Amendment rights as individuals, but whether the challenged statute abridged the kind of expression that the First Amendment was designed to protect. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Unfortunately, the FEC suppresses expression plainly within the contemplation of core First-Amendment protection by an arbitrary debasement of political parties.

[3] *See, e.g., Texas v. Johnson*, 491 U.S. 397, 399 (1989) ("America, the red, white, and blue, we spit on you."); *Cohen v. California*, 403 U.S. 15, 16 (1971) ("Fuck the Draft").

Whatever limited purpose may be served by privileging an individual Democrat or an individual Republican—or, indeed, groups of party loyalists that are not formally "parties"—over the political parties to which they contribute or belong, the *magnitude* of the privileging in this case serves no legitimate purpose.[4]

1. By Federal Fiat, Political Parties Cannot Make "Independent Expenditures," Regardless of Whether Any Conceivable "Corruption" Justification Exists.

In the two decades since *Buckley*, it has become a fixture of First Amendment jurisprudence that "independent expenditures" for political speech—even where federal campaigns may be implicated—enjoy robust protection.[5] That solicitude for "independent" spenders—and for deliberative democracy—does nothing for political parties.

According to the FEC, political party committees, as defined by regulation,[6] can only make "coordinated expenditures," subject to the limitations of § 441a(d), and "are incapable of making independent expenditures."[7] All

[4] Of course, "[a]ny interference with the freedom of a [political] party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).

[5] Restrictions on independent expenditures "must be analyzed with great solicitude and care, because independent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 669-70 (Brennan, J., concurring) (*quoting Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (*quoting Williams v. Rhodes*, 393 U.S. 23, 32 (1968))).

[6] The political party committees deemed incapable of making "independent expenditures" are the national committee of a political party, and "a State committee of a political party, including any subordinate committee of a State committee." 11 C.F.R. § 110.7(b)(1) (1995).

[7] Advisory Opinion 1985-14 at 5819 n.4 (*citing* 11 C.F.R. 110.7(a)(5)

"coordinated" expenditures are, in turn, treated by law as "contributions," and thus subject to strict limitations. *See* 2 U.S.C. § 441a(a)(7). But the federal government thus consigns too much to the restrictive category, "contribution," and entirely fails to appreciate the First-Amendment freedoms that this Court has jealously guarded in the arena of political discourse.

Amici agree with Petitioners that speech expenditures by a party cannot be constitutionally limited, even if pre-arranged and coordinated with a particular candidate. Alternatively, amici argue that the statutory regimen, to survive strict scrutiny, must be narrowly construed to apply only to express advocacy speech that is *in fact* pre-arranged and coordinated with a particular candidate.[8] The Tim Wirth ad at issue in this case was neither express advocacy, nor was it pre-arranged or coordinated with a particular candidate (no Republican candidate having been nominated).

• • •

The *Buckley* Court acknowledged the dangers of actual and apparent *quid pro quo* corruption that stem from a system allowing large direct donations, and thus upheld the limitations on direct donations to candidates for federal election. 424 U.S. at 26-29. The Court emphasized, however, that "the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the

and (b)(4); Advisory Opinions 1984-15 and 1980-119 (¶ 5561); General Counsel's Report, MUR 273.); *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28-29 & n.1 (1981) (noting regulation, without ruling on issue).

[8] The FEC's *per se* rule violates not only the First Amendment, but also the Fifth Amendment due process clause because it does not allow political parties to rebut the presumption of coordinated expenditures. *See Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Heiner v. Donnan*, 285 U.S. 312 (1932).

institutional press, candidates, and *political parties*." *Id.* at 28-29 (emphasis added).

In sum, the restrictions on direct contributions survived precisely because they did *not* materially penalize political debate. The justification for limiting contributions is therefore irreconcilable with the overt suppression of the Colorado Committee's political speech in this case. The Colorado Committee's speech was never examined to determine whether it was *actually* the kind of "direct contribution" that aggravates the risk of *quid pro quo* corruption, or whether it might *actually* be more like an "independent expenditure." Instead, it was *presumptively* the kind of political speech most likely to involve corruption. The federal government simply cannot burden protected political speech with such blunt instruments.

With the *Buckley* Court's distinction between "independent" and "coordinated" expenditures as a backdrop, this case well illustrates the mischief of consigning *all* party expenditures to the shackles of "contributions." Direct contributions are easy to link directly to the campaign, without intermediation, and only marginally related to First Amendment expression. Independent expenditures, by contrast, are not only quintessential political speech, but

> may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidates.

Buckley, 424 U.S. at 47. The Colorado Committee ads were treated as "coordinated expenditures" even though—at the time the ads ran—there was no Republican candidate for the Senate seat sought by Tim Wirth. Clearly there was no

"prearrangement and coordination" with a Republican candidate. Yet the federal government determines, categorically, to treat this *factual absence* of "prearrangement and coordination" as *legal* prearrangement and coordination, even if a Republican candidate never materializes, and even if a Republican candidate that *does* ultimately materialize would never have approved the expenditures.[9]

While it may certainly be presumed that state political parties desire the success of their candidates and defeat of the others, it does *not* follow that political parties are more likely instruments of corruption. And the *consequence* of conceding that political parties always favor their candidates must still be narrowly tied to the singular regulatory justification of corruption. It is both counter-factual and counter-intuitive to maintain that parties are singular corrupting influences upon their own candidates.

Political parties compete for the reins of government. They do not therefore possess the media's inherent institutional independence from government. But of course, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *Bellotti*, 435 U.S. at 782. When we locate enhancements of deliberative democracy in institutions *other* than the press, it serves no

[9] The Colorado Committee ads criticized the fact that Tim Wirth had voted against new weapons systems and against the balanced budget amendment. It is among the many ironies of the FEC's regime that the Colorado Committee's political speech would have been deemed "coordinated," even if a Republican candidate that later announced *likewise* had voted against the balanced budget amendment, or against new weapons systems, or for whatever reason likewise opposed a balanced budget amendment or spending on new weapons systems. In that event, the Colorado Committee ads would clearly "provide little assistance to the candidate's campaign and indeed may prove counterproductive," *Buckley*, 424 U.S. at 47—if not outright embarrassing. But by federal law, they would be "coordinated expenditures," *de jure* "prearrangements" though absolutely not in fact.

interest to suppress these enhancements merely because they originate outside the press.

Political parties do not operate as a perpetual counterpoint to the power of government; indeed, they seek to elevate their own into government. Do we then consign political parties to the status of government itself for First Amendment purposes? Quite the contrary: it is precisely party ambition that guarantees the greatest incentive to ferret out and expose the misdeeds and misinformation of the *other* parties.[10] Political parties, sometimes even more than the press, guarantee the *opposition*. A journalist might establish a comfortable rapport with the public servants on her beat, perhaps even a comfort level that compromises her zeal to pose the hard questions. But the other party will *always* demand accountability. Political parties are critical institutions of political speech. Their salutary effect on accountable government cannot be doubted, even if it be conceded that they care particularly about the misdeeds of the *other* party.

Consider this hypothetical ad that might have been run by the Colorado Committee. A Republican party member discovers evidence that a Democratic officeholder and candidate for reelection has been guilty of classic *quid pro quo* corruption—that is, assume that he has performed a legislative favor in exchange for a contribution, however disguised, to his election campaign. The Colorado Committee runs an ad publicizing the *quid pro quo* arrangement—thereby exposing precisely the venality targeted by the Federal Election Campaign Act. Yet this

[10] *Cf. Grosjean v. American Press Co.*, 297 U.S. 233, 247, 250 (1936) (invalidating tax on press and praising speech that helps to ensure citizen awareness of the "doings or misdoings of their government," and noting that "informed public opinion is the most potent of all restraints upon misgovernment."); *Minneapolis Star & Tribune Co. v. Minnesota*, 460 U.S. 575, 585 (1983) ("an informed public is the essence of working democracy").

extraordinary *private* vindication of the only justification for *government* involvement in the process would necessarily suffer suppression by the government.

At some point, the legal fictions that inform legislation and regulation, however expedient, must bend to reality. This is acutely true when fundamental constitutional rights are at stake. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 265 (1986) ("*MCFL*").

The theoretical "possibility" of corruption cannot forever substitute for empirical or rational justification.[11] As this Court stated recently, "when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than 'simply posit the existence of the disease to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995).

The federal government has never asserted more than a conjectural harm to the pure political speech of political parties. The substantial burdens on such core expression accordingly cannot stand.

[11] *See Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) ("This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

2. Political Parties, Like Political Action Committees, Should Be Free to Criticize Elected Officials Because Their Resources Reflect Actual Political Support, Rather Than Capital Amassed in Economic Markets.

"The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. Even for-profit corporations, the entities demonized in much election law jurisprudence, may make unlimited expenditures that celebrate one public official or brutalize another, as long as they do not expressly instruct the electorate on how to vote. However, if any such expenditure, independent or otherwise, expressly advocates the election or defeat of a candidate for federal office, then it cannot be made out the corporation's general treasury. *See* 2 U.S.C. § 441b(a). Corporations may participate in federal elections only through the instrument of a political action committee. *See* 2 U.S.C. § 441b(b)(2). As this Court explained in ruling that for-profit corporations are properly subject to this narrowly-tailored intrusion on their political speech:

> The resources in the treasury of a business corporation ... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258. To avoid the potential political distortion of capital amassed in the marketplace, corporations are forbidden the use of this capital in federal election campaigns. But a corporation may make independent expenditures through separate segregated funds (a political

action committee). "Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660-61 (1990).

This careful limitation—that leaves a suitable alternative channel for corporate political speech—dramatically illustrates the unfairness of the unique disability imposed upon state political parties, which cannot employ the expedient of "independent expenditure" through a "political action committee," and the *direct* expenditures of which are severely curtailed.

Just as the corporate alternative of a "political action committee" achieves the requisite actual link between political support and financial resources, so the resources of a party committee *precisely* indicate popular support for the committee's political ideas. Indeed, the resources of a party committee—taken as a surrogate for specific political support—are even more precisely indicative than the resources of a corporate political action committee, which may come from donors who lack a clear idea of the parent corporation's political agenda. Thus, the judicial solicitude for corporate campaign speech ought to extend all the more vigorously to political parties.

The illogic of specially debasing political parties would be troublesome in any context. But when the political party engages in pure political speech, it should be presumptively free—and certainly not lesser in liberty than for-profit corporations.[12]

[12] Amici submits that this Court's rationale in *MCFL* compels the unfettered freedom of political parties to engage in core political speech, whether denominated "coordinated" or "independent."

C. Source Restrictions and Disclosure Requirements Achieve Any Legitimate Government Aim to Combat "Corruption" Without Offending the First Amendment.

Political campaign regulation implicates core First Amendment concerns, and cannot be justified apart from the genuine specter of corruption. Indeed, "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985); *see Buckley*, 424 U.S. at 25-27.[13]

Eliminating the present burdens on pure political speech would hardly unloose political parties to play havoc on electoral integrity. If the caps on political speech were lifted today, political parties would remain subject to a substantial regulatory regimen. If candidates really can be corrupted by their own parties—and amici dispute this counter-intuitive notion—then the federal government retains abundant tools to address any such actual or apparent corruption.

The comprehensive statutory and regulatory scheme controls from whom political parties may accept money, how much they may accept, and the extent to which they must disclose contributions to candidates and from contributors. The Act prohibits party committees from accepting money, into their federal-election accounts, from certain sources—including the general treasury funds of corporations, labor organizations, and national banks; federal government contractors; and foreign nationals. 2 U.S.C. § 441(b), (c) and (e); 11 C.F.R. §§ 110.4, 114.2(a) and (b).

The Act and its regulations further restrict the amounts of contributions for federal elections that local, state and

[13] *See also Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298-99 (1981); *California Medical Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981); *Bellotti*, 435 U.S. at 790-91.

national parties may receive,[14] and impose limits on the amounts of money a party committee can contribute to a federal candidate committee. These limitations greatly reduce any possibility of corrupt arrangements between party committees and candidates responding solely to the party committees funding their campaigns. Local and state parties may make a financial contribution up to a combined amount of $5,000 per election;[15] multicandidate national party committees and multicandidate PACs may contribute up to $5,000 per election each, and non-multicandidate PACs may contribute up to $1,000 per election to candidate committees. 2 U.S.C. § 441(a); 11 C.F.R. §§ 110.1, 110.2.

Political parties must disclose the total receipts and disbursements, broken down into certain categories, and provide an itemized accounting.[16] Moreover, candidate

[14] Local or state party committees may receive from individuals or partnerships up to $5,000 as a combined total per year, national party committees up to $20,000. All party committees may make unlimited transfers among themselves. Local and state party committees may receive up to $5,000 per year as a combined total from multicandidate political action committees ("PACs") and non-multicandidate PACs, while national party committees may receive up to $15,000 per year from multicandidate PACs and $20,000 per year from non-multicandidate PACs. 2 U.S.C. § 441(a); 11 C.F.R. §§ 110.1, 110.2, 110.3.

[15] A state party committee shares its limits with local party committees in the same state, unless a local party can demonstrate its independence. 11 C.F.R. § 110.3(b)(1)(ii) and (3).

[16] 2 U.S.C. § 434(b); 11 C.F.R. § 104.3(a)(4). Party committees must itemize: contributions from political committees; transfers from other party committees and party organizations; loans received; loan repayments received; refunded contributions from political committees; and contributions that exceed $200 from the same source from individuals, offsets to operating expenditures, and other receipts such as interest and dividends. Itemized information includes: the name and address of the contributor, the name of his or her employer, his or her occupation, the date of receipt, the amount, and the aggregate of all receipts received that year from the same source.

committees must disclose all contributions from party committees. 2 U.S.C. § 434(b)(2)(C); 11 C.F.R. § 104.3(a)(3). These disclosures are matters of public record.

The federal government's move against pure political speech does not occur in a vacuum. It is merely *another* weapon in a substantial federal arsenal for fighting *not* merely corruption itself, but the tantalizing *possibility* of corruption. While the means to combat actual corruption may yield little to excite the regulatory imagination, the means for combating *possible* corruption are virtually inexhaustible. The danger to the First Amendment is plain.

Broad prophylactic rules *outside* the ambit of protected political speech may pass muster. But "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).[17]

Two decades after this Court first articulated a "corruption" justification for limited government regulation of political expression—and a full decade since this lawsuit was filed—the federal government has yet to identify any genuine "corrupting" effect of party political speech.

II. EVEN IF THE STATUTE IS FACIALLY CONSTITUTIONAL, ITS SCOPE MUST BE LIMITED TO "EXPRESS ADVOCACY," AS STRICTLY CONSTRUED IN *BUCKLEY*.

If the direct suppression of core First Amendment speech does not categorically condemn the restriction on political

[17] This Court, in a series of analogous charity-fundraising cases, repeatedly rejected government's asserted interest in preventing fraud, emphasizing that existing fraud laws and disclosure requirements addressed the problem without offending the First Amendment. *See, e.g., Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 789 (1988). Political parties—engaged in pure political speech—surely invite the same respect.

parties, that is, if a compelling justification can be identified to save the restriction in principle, then it remains to be examined whether the restriction on speech, as applied, violates the First Amendment in ways not apparent on the face of the law. If the law, as applied, overreaches, then it becomes this Court's role to construe the law with sufficient rigor to save it from unconstitutionality, if possible. *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

A. Strict Judicial Interpretation of the "Express Advocacy" Standard Is Necessary to Arrest the FEC's Expansion of Regulation Over Political Speech.

Since the FEC's enforcement action here plainly implicates core First Amendment rights, this Court must examine the FEC's interpretation of its statute with "exacting scrutiny." *McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. 1511, 1519 (1995).

This Court in *Buckley* distinguished between, on one hand, protected "discussion of issues *and candidates*," and on the other, "advocacy of the election or defeat of candidates." *Buckley*, 424 U.S. at 42 (emphasis added). Lamenting that this distinction might well "dissolve in practical application," the Court imposed a rigorous bright-line test to avoid abuse of the First Amendment. The term "expenditures," held the Court, must be construed to apply "only to expenditures that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 42-44 (emphasis added).

In order to eliminate overbroad regulation of speech, the Court provided very specific guidance: "This construction would restrict the application [of the Act] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'elect,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"

Id. at n.52; *see MCFL*, 479 U.S. at 248-49. In this case, the Colorado Committee ad was clearly a permissible discussion of "issues and candidates" that this Court declared off-limits to government interference.

B. The FEC Repeatedly Disregards This Court's First Amendment Rulings on the Limits of Political-Speech Regulation.

For two decades, the bridle of *Buckley* has restrained the most obvious aggrandizements of government regulation. But the FEC's charge is both solemn and slippery: target the appearance of corruption in federal elections. In its embrace of a worthy goal, the agency has habitually overreached.

The FEC's enforcement decisions have disregarded this Court's warning that any restrictions on freedom of expression "must be minimal, and closely tailored to avoid overreaching or vagueness." *See Buckley*, 424 U.S. at 78-82; *MCFL*, 479 U.S. at 249. The result has been a series of FEC enforcement actions that has led to eight lower court decisions, not counting this case—seven of which have rebuked the FEC's reading of "express advocacy." However, the grounds applied by the lower courts have been far from uniform, further underscoring the constitutional danger of attempting to apply an "express advocacy" standard beyond the precise guidance of *Buckley* and *MCFL*. As applied by the FEC in this and other cases, the Act has become constitutionally infirm. As demonstrated, *infra*, the FEC has substantially diluted this Court's "express advocacy" standard to embrace vague and subjective "electioneering messages."

1. Lower court decisions

A series of lower court cases brought by the FEC to enforce its test for "express advocacy" illustrate its persistent attempts to inflate the standard. The Second Circuit aptly characterized the FEC's expansion attempts:

> [C]ontrary to the position of the FEC, the words "expressly advocating" means [sic] exactly what they say ... [T]he FEC would apparently have us read 'expressly advocating the election or defeat' to mean for the purpose, express or *implied*, purpose of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley*.

FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) ("*CLITRIM*").[18]

And just this week, a federal district court invalidated the FEC's new regulations defining "express advocacy," 11 C.F.R. § 100.22. "Once the Supreme Court has spoken on an issue . . . it is not the role of the FEC to second-guess the wisdom of the Supreme Court." *Maine Right to Life Committee v. FEC*, No. 95-261-B-H, slip op. at 10 (D.Me. Feb. 13, 1996).

Ignoring both *Buckley* and *CLITRIM*, the FEC's crusade to expand the standard has led to the inconsistent interpretation and enforcement that the Court feared would chill political debate. By refusing to accept this Court's *Buckley* standard, the FEC has put all speakers engaging in the marketplace of political ideas

> wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Thomas v. Collins, 323 U.S. 516, 535 (1945).

[18] *See also Faucher v. FEC.*, 928 F.2d 468, 472 (1st Cir.) ("In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional question the [Supreme] Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*."), *cert. denied*, 502 U.S. 820 (1991).

The lower court opinions since *Buckley* demonstrate the "varied understanding" warned of in *Thomas*. In *FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315, 316 (D.D.C. 1979) ("*AFSCME*"), despite the absence of any express words urging the election or defeat of a candidate, the FEC contended that posters qualified as express advocacy under its reading of the FECA. The court squarely rejected the FEC's position, finding no express advocacy of the type described in *Buckley*. Even though the poster included a clearly identified candidate and "may have tended to influence voting, it contains communication on a public issue widely debated during the campaign." *Id.* at 317.

In *CLITRIM*, 616 F.2d 45, the FEC charged that a non-profit unincorporated association had published a leaflet allegedly expressly advocating the election or defeat of a clearly identified candidate without filing with the FEC or using the correct disclaimer.[19] The Second Circuit rejected the FEC's charges, finding that "the words 'expressly advocating' mean exactly what they say." *Id.* at 53. The court continued:

> [t]he nearest it comes to expressly calling for action of any sort is its exhortation that 'if your Representative consistently votes for measures that increase taxes, let him know how you feel. And thank him when he votes for lower taxes and less government.' Neither this nor the voting chart calls for anyone's election or defeat.

Id.

The Ninth Circuit took a different approach in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). It reviewed highly critical full-page ads taken out in

[19] The four page leaflet, which cost $135, and was published by CLITRIM, a project of the John Birch Society, advocated lower taxes and less government, and included a photograph and a chart characterizing 21 of 24 votes that a local congressman cast as being for "higher taxes and more government." *Id.* at 49-51.

major newspapers one week before the presidential election which featured the caption "Don't let him do it" about incumbent President and candidate Jimmy Carter. While the FEC agreed that the ad did not contain words expressly telling people to vote against President Carter, it argued that the *Buckley* decision merely provided guidelines for determining express advocacy.[20]

In *Furgatch*, the Ninth Circuit adopted a different standard than the *AFSCME* and *CLITRIM* courts, holding that express advocacy is not strictly limited to communications using certain key phases and that it was therefore compelled "to interpret and refine the standard...." 807 F.2d at 861; *cf. MCFL*, 479 U.S. at 249 (adopting the *Buckley* bright-line test). "The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." *Furgatch*, 807 F.2d at 863. The court proposed a standard for express advocacy: that speech, when read as a whole and with limited reference to external events, may only be interpreted as an exhortation to vote for or against a specific candidate. In attempting to craft a definitive test, the Ninth Circuit stated:

> This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated.

[20] Significantly, while the *Furgatch* decision was handed down on January 9, 1987, it contains no citations to this Court's decision only three weeks earlier in *MCFL*. Thus, the *Furgatch* court ignored the *MCFL* decision's clear reiteration of the *Buckley* strictures.

Id. at 864. The panel also established as part of its test that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy. . . ." *Id.* Despite the attempt to craft a more expansive standard, no other court has reached a conclusion consistent with the Ninth Circuit's, with the exception of the court below in this case.[21]

In *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) ("*NOW*"), the court used the "reasonable minds could differ" test of *Furgatch*, but reached a different conclusion based on the facts. In ruling against the FEC, the *NOW* court observed:

> In *Buckley*, the Court agreed that funds spent to propagate one's views on issues without expressly calling for the election or defeat of a clearly identified candidate are not covered by the FECA. ... NOW's letters do not contain pointed exhortations to vote for or against particular persons.

NOW at 433-34.

In *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), the FEC again sought to expand the scope of express advocacy beyond its permissible bounds. The Maine Right to Life Committee, Inc., a nonprofit organization that promoted pro-life issues, sought to publish a newsletter that surveyed candidates' positions on pro-life issues. *Id.* at 469. Despite the absence of any explicit language urging readers to vote for certain candidates, and the presence of the disclaimer, the FEC contended that this publication constituted express advocacy. *Id.* at 471. The First Circuit rejected the FEC's argument that the publication contained express advocacy: "In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the

[21] The FEC has adopted this standard for internal enforcement matters and has based much of its recently completed "express advocacy" rulemaking on a misreading of the *Furgatch* decision.

Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*." *Id.* at 472.

The court in *FEC v. Survival Education Fund,* 1994 U.S. Dist. Lexis 210 (S.D.N.Y. 1994), *aff'd in part and rev'd in part*, 65 F.3d 285 (2nd Cir. 1995) also rejected an attempt by the FEC to apply a broad "express advocacy" standard. The FEC claimed the groups sent out two letters advocating President Reagan's defeat that failed to include a disclaimer telling who paid for them and stating that they were not authorized by any candidate. While finding that the letters, which came four months before the election, were hostile to President Reagan, the court said they did not expressly advocate voting against him. Citing the "express words" of *Buckley*, the court held:

> It is clear from the cases that expressions of hostility to the positions of an official, implying that that official should not be reelected -- even when that implication is quite clear -- do not constitute the express advocacy which runs afoul of the statute. Obviously, the courts are not giving a broad reading to this statute.

Id. at 4.

The Second Circuit affirmed the summary judgment in SEF's favor, holding that the statute "cannot constitutionally be applied to burden any speech, whether express advocacy or not, by a nonprofit political advocacy corporation like SEF which is independent of corporate and labor interests." *FEC v. SEF*, 65 F.3d 285, 290 (2d Cir. 1995).

In *FEC v. Christian Action Network,* 894 F. Supp. 946 (W.D.Va. 1995), the FEC charged that a non-profit corporation used its treasury funds to air anti-Clinton advertisements that, according to the FEC, constituted express advocacy of the defeat of the Clinton-Gore ticket in the 1992 election. Demonstrating the difficulty in uniformly applying a reasonable person standard instead of the Court's bright-line *Buckley* test, the district court came to a much

different conclusion than the *Furgatch* court. Despite similar facts, the *Christian Action Network* court found the ads did not contain "explicit words or imagery advocating electoral action." *Id.* at 948. To the contrary, the court said the ads represented issue advocacy informing the public about political issues, and therefore protected political speech. *Id.*

In reaching this conclusion, the court surveyed the prior cases and, noting the problems with the *Furgatch* standard, found the ads did not constitute express advocacy since they "were devoid of any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute 'express advocacy' as that term is defined in *Buckley* and its progeny." *Id.* at 953. Rather, the court found that the ads discussed issues. "[T]he ability to present controversial viewpoints on election issues has long been recognized as a fundamental First Amendment right." *Id.* at 955 (citations omitted).

Most recently, the United States District Court for Maine invalidated the FEC's new "express advocacy" regulations on the grounds they exceeded the constitutionally permissible boundaries set forth in *Buckley*. *Maine Right to Life, supra*, slip op. at 10. The court explicitly rejected *Furgatch*, which it identified as the FEC's support for its regulations, stating that the ads at issue in *Furgatch* were "precisely the type of communications *Buckley, Massachusetts Citizens for Life* and *Faucher* would permit." *Id.* Contrasting *Furgatch* with the other cases, the district court said:

> *Furgatch* allowed the FEC to prohibit the speech (recognizing it as a 'very close call,' *id.* at 861); *Buckley, Massachusetts Citizens for Life* and *Faucher* call for letting it go forward in order to preserve the discussion of public issues even at the risk that it is used to elect or defeat a candidate.

Id.

In sum, this Court established a bright line test to prohibit governmental intrusion into protected political discourse. By providing specific examples of words and phrases that constituted "express advocacy," this Court established a precise framework that allows participants in the marketplace of ideas to know exactly what is permitted and what is not. This approach ensures against the inhibitions of laws that probe the shades and nuances of words. By establishing such a framework, the Court elevated First Amendment rights over the regulations put in place by the statute.

2. FEC Advisory Opinions

Similar to its record in lower court cases, the FEC's advisory opinions demonstrate an inconsistent application of the "express advocacy" standard and one that cannot be reconciled with *Buckley*. Indeed, in the advisory opinion process, the Commission has gone beyond its unconstitutionally expansive "express advocacy" standard and has applied an even broader "electioneering message" standard to decide whether a political party's expenditures, like the ones at issue here, are subject to the "coordinated party expenditure" limit of 2 U.S.C. § 441a(d).

In Advisory Opinions 1984-15 and 1985-14,[22] the Commission attempted to separate a political party's lawfully unlimited issue-oriented or party-building speech from those messages that are subject to the limits of section 441a(d). The Commission held that a party's expenditures will be allocable to the coordinated limits if they merely contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, at 11,185. According to the Commission, an electioneering message "includes statements 'designed to urge the public to elect a

[22] FEC Advisory Opinion 1984-15, *Fed. Election Camp. Fin. Guide* (CCH) ¶ 5766, at 11,067-3 (1984); FEC Advisory Opinion 1985-14, *Fed. Election Camp. Fin. Guide* (CCH) ¶ 5819, at 11,182 (1985).

certain candidate or party.' *United States v. United Auto Workers*, 352, U.S. 567, 587 (1957)." *Id.*

In further articulating this broad standard, the Commission held that coordinated party expenditures cover all advertisements whose "clear import and purpose . . . (is) to diminish support for any Democratic Party Presidential nominee and to garner support for whoever may be the eventual Republican party nominee." FEC Advisory Opinion 1984-15, at 11,069. Specifically, the Commission found certain ads were subject to the limit because they "effectively advocate the defeat of a clearly identified candidate in connection with (an) election and thus have the purpose of influencing the outcome of the general election." *Id.* at 11,070.

Accordingly, the Commission does not even employ its own express advocacy test for allocating a party committee's expenditures to the coordinated limit, but instead uses a wide-open "electioneering message" test that sweeps within the limit any statement by a party committee which may "diminish support" for, or "effectively" advocate a candidate's election. It was precisely that test which the Commission used to allocate the expenditures in this case, and therefore unconditionally restricted the First Amendment rights of the Colorado Republican Party.

C. The FEC's New Regulations on "Express Advocacy" Further Illustrate Its Disregard of First Amendment Concerns.

In the aftermath of the Court's *MCFL* ruling, the FEC took nine years until 1995 to promulgate new regulations that include new language on express advocacy. The new regulations maintain the standard the FEC has attempted to impose since *Buckley*, which, as the recent *Maine Right to Life* decision and other cases demonstrate, is inconsistent with the bright-line *Buckley* test. The revised regulations perpetuate the infirmities discussed above by imposing a

standard which punishes speech that, in the FEC's estimation, *implies* an "electioneering message."

Under the new regulations, 11 C.F.R. § 100.22 (1995), the term "express advocacy" includes the following subjective standard:

> (b) When [the communication] taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because:
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Subsection (b) of the regulations contains the very infirmity of subjectivity that this Court sought to avoid in establishing its bright line test.[23] As the Maine district court recently observed:

> The [*Buckley*] Court seems to have been quite serious in limiting FEC enforcement to express advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited."

Maine Right to Life, slip op. at 9 (emphasis in original).

The FEC's new regulations expand the scope of "express advocacy" as follows:

[23] As a legal matter, there appears to be no difference between the "reasonable person" test introduced in the FEC's new regulations and the "implied" advocacy test the FEC used in *CLITRIM* and other cases, and the "totality of circumstances" test the FEC used in Advisory Opinions 1984-15 and 1985-14.

> Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage action to elect or defeat the candidate in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the *timing of the communication would be considered on a case-by-case basis.*

60 Fed. Reg. at 35295 (July 6, 1995) (emphasis supplied).[24]

So alarmingly eager is the FEC to impose its "reasonable person" on a case-by-case basis that its new regulations exceed even the reach of *Furgatch*, the single "express advocacy" case won by the FEC and its favorite authority for its new regulations. *Furgatch* is careful to require that the communication "when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as *an exhortation to vote for or against* a specific candidate." 807 F.2d at 864 (emphasis added). It further instructs that "speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act." Yet 11 C.F.R. § 100.22 ignores even the exhortation requirement of *Furgatch* to say that the communication taken as a whole and in the context of external events need only "encourage actions" to elect or defeat a candidate. 60 Fed. Reg. at 35295.

FEC enforcement has been a history of side-stepping this Court's admonition that "express advocacy" be strictly

[24] Furthermore, in explaining the meaning of the regulations for communications that combined electoral and issue advocacy, the FEC indicated that it would continue a totality of the circumstances test by taking the communication as a whole and evaluating "the circumstances under which" the statements were made and "with limited reference to external events." *Id.*

interpreted.[25] Each case is "unique," declares the FEC, despite the *Buckley* Court's adoption of the "express advocacy" standard *precisely* so the FEC would not infringe unnecessarily upon the First Amendment. 424 U.S. at 43-44.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[25] The vagueness of the FEC's definition of "express advocacy" or "electioneering message" cannot be cured by its advisory opinion process under 2 U.S.C. § 431(f). *See Maine Right to Life*, *supra*, slip op. at 4-5. As a practical matter, the delay attendant in procuring an advisory opinion from the FEC (up to 60 days) seriously handicaps robust political speech, which requires sufficent lead time to plan and produce, or which may require last minute changes to meet late breaking political developments. Furthermore, since advisory opinion requests are published by the FEC for comment, the political opponents or target of the proposed speech will be alerted to the advertisement and take pre-emptive measures that may dilute the efficacy of the proposed speech. If a negative decision is rendered by the FEC, the speaker is forced to incur costly and time-consuming litigation to challenge the FEC's judgment. Finally, there is no guarantee that the FEC issue any opinion, thereby forcing the speaker to risk prosecution if he or she decides to engage in political speech. These defects of the advisory opinion process chill or delay protected speech in violation of the First Amendment. *See Carroll v. Prince Anne*, 393 U.S. 175, 182 (1968); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1987).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and
DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

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QUESTION DEALT WITH HEREIN

Whether the right of political parties to engage in issue advocacy is protected by the free expression and free association guarantees of the First Amendment to the United States Constitution.

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BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS[1]

INTEREST OF AMICUS CURIAE

The National Right to Life Committee, Inc. ("NRLC") is a nonprofit corporation, recognized by the Internal Revenue Service as an organization qualified under 501(c)(4) of the Internal Revenue Code. NRLC's purpose is to promote respect for the worth and dignity of human life from conception until the time of natural death. It is a nonpartisan, nonsectarian federation of affiliate organizations from the 50 states and the District of Columbia and about 3,000 local chapters, made up of individuals from every race, creed, ethnic background, and political belief. NRLC is governed by a Board of Directors, representing the affiliate organizations. NRLC engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent, individual human life.

As a part of its advocacy of the pro-life issue, NRLC engages in constitutionally-protected issue advocacy in the political arena. A decision of the Court in this case in favor of Respondent Federal Election Commission would have far-reaching and negative implications, as described herein, for the application of election laws and regulations to NRLC and similarly-situated organizations. Therefore, NRLC seeks to advance its interests by addressing the legal issues herein.

SUMMARY OF THE ARGUMENT

Political parties exist to advance issues, not just specific candidates. This is evident from the history of party formations, their rise and fall in public favor, their platforms, and their advocacy activities. In past decisions, such as *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has developed a bright-line rule to

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[1]This brief is filed with consent of the parties. Petitioners' consent form and Respondent's consent letter have been filed with the Court Clerk.

guard constitutionally-protected issue advocacy from laws regulating electioneering. Political parties need — and are constitutionally entitled to — the same bright-line protection of their issue advocacy that other organizations enjoy.

In the present case, the Tenth Circuit erred by holding that "any expenditure [by a political party] in connection with the general election campaign of a candidate," 2 U.S.C. § 441a(d)(3), is not protected issue advocacy if it "involves a clearly identified candidate and an electioneering message," even if the advertisement addressed public issues and did not expressly advocate the election or defeat of a federal candidate.

Because the Tenth Circuit adopted the FEC's position that a message that would otherwise be issue advocacy may become electioneering by employing a totality of the circumstances test, this case has broad implications. The decisions of this Court have required that such evaluations be made by examining the narrow facts related to the message itself, not by use of a broad range of contextual considerations. The totality of the circumstances approach of the FEC and the Tenth Circuit does not adequately protect free expression, as required by the First Amendment. If a totality of the circumstances test were adopted, there would be serious and negative consequences for the free expression and association activities of other entities besides political parties.

ARGUMENT

I. Political Parties Advocate Issues, Not Just Candidates.

Political parties form around issues. The fortunes of parties ebb and flow with the fall and rise of public concern about issues identified with political parties. Parties identify themselves with issues by advocating issues in their platforms and other fora. Therefore, parties do not exist for the sole purpose of electing candidates. The discussion in this section explains and documents these assertions.

A. *Parties Form Around Issues.*

Political parties are simply people organized to advance issues important to them in the political arena, and election of candidates is a means to advance these issues. Examination of the history and fortunes of American political parties reveals that they form, and survive or fail, in large part on the basis of the issues they advocate. There are, of course, other factors involved in party loyalty, such as ambition and self-interest. But, even the most ambitious politician must run on issues in order to be elected. An ideologically-compatible party is often essential to that effort. And, even the patronage-seeking party hack will not long receive the anticipated dole from a political machine out of step with the issues of the day.

Thus, out of utility or ideology, advancing issues is a central and essential part of party activity.[2] A brief historical survey reveals that this has long been the case.

1. The Federalist Party.

In the wake of the Revolutionary War, the Federalists were predisposed to define issues and solutions as national in scope. They shared a vision of a "Republic of Virtue," which would require a centralized government at least strong enough to secure order, predictability and stability. Linda K. Kerber, *The Federalist Party, in* 1 *History of U.S. Political Parties* 3, 3-4 (Arthur M. Schlesinger, Jr. ed., 1973). This party promoted the ratification of the Constitution and advanced arguments in support of national

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[2]Indeed, to a world often offended by purely partisan activity, the advancement of parties as issue advocates may seem important as an antidote. A recent book documents that modern political parties are not political machines but coalitions around key issues. "Contemporary [political party] conventions are . . . combinations of issue and ideological movements: liberal groups representing African Americans, feminists, environmentalists, and the like in the Democratic party, and conservative groups advocating antiabortion, religious principles, and other conservative causes in the Republican party." John H. Aldrich, *Why Parties?* 291 (1995).

unity. Once the new government was in place, however, it soon became apparent that the broad Federalist ideology would not withstand the divergence of opinions on other national issues, and the party eventually faded away from the political scene.

2. The Jeffersonian-Republican Party.

The Republican Party began as "republican sentiment," led by Thomas Jefferson's opposition to Hamilton's national and foreign policies. Jefferson's presidential "platform" in the election of 1800 outlined his views on a variety of national issues, such as the preservation of power to the states, his opposition to a standing army in times of peace, his reluctance to form intimate connections with foreign governments, and his intent to keep the federal government frugal and simple. Noble E. Cunningham, Jr., *The Jeffersonian Republican Party, in* 1 *History of U.S. Political Parties* 239, 254 (Arthur M. Schlesinger, Jr. ed., 1973). Jefferson's election in 1801 (in the House of Representatives) marked the first transfer of government power from one party to another, and ushered in roughly twenty years of Republican political control. *Id.* at 258-59. As the Federalist Party weakened, leaving no real opposition to the Republicans, internal dissatisfaction with dilution of the party's firm stand on some of these Jeffersonian issues prompted a party split. *Id.* at 265-72

3. The Democratic Party.

The Democratic Party emerged in an era of economic transition in America, initially fueled by growing anti-bank sentiment as the former agrarian economy gave way to commercial capitalism. Michael F. Holt, *The Democratic Party 1828-1860, in* 1 *History of U.S. Political Parties* 497, 498-99 (Arthur M. Schlesinger, Jr. ed., 1973). The party stood for popular sovereignty and was viewed as the representative of the common man. *Id.* at 513. Unlike prior political parties, however, Democrats seemed to retain supporters on the basis of fierce party loyalty rather than issue identification, *id.* at 504, until the party's stand on government

non-intervention with regard to slavery divided the party — and the nation — along primarily geographic lines.

4. The Whig Party.

The Whig Party is in many ways the exception that proves the rule. It tried to remain issueless, but met its demise for failure to take a stand. In 1834, in reaction to Jacksonian democracy, opposing forces banded together to oppose the Democrats. They called themselves Whigs. John A. Crittenden, *Parties and Elections in the United States* 25 (1982). The party organized around the proposition that "[t]he outs might win, if they could pool their forces against the ins." *Id.* The group included those who sought energetic internal improvements in the Nation, advocates of states' rights, and people of culture who disliked Jacksonian anti-intellectualism. *Id.* However, "[t]he Whigs did not adopt a platform, and they avoided taking stands on issues in the campaign." *Id.* at 26. Only one candidate, Henry Clay, had known positions, and his opposition to the annexation of Texas misjudged public sentiment. *Id.* Most candidates nominated by the party were "nonpolitical military heroes." *Id.* This issuelessness contributed to the downfall of the party. As the slavery issue rose in public debate, the Whigs once again ran an issueless candidate, Winfield Scott, without success. *Id.* at 27. "A growing anti-slavery sentiment in the Northern wing of the party repelled the Southern Whigs, and most of them defected to the Democrats." *Id.* However, with the rise of the Republican Party (which would stand for issues), Whigs opposed to slavery (and those focused on other issues, e.g., temperance advocates and Know-Nothings) found a new home. The Whig party slid into oblivion.

5. The Republican Party.

There is perhaps no greater example which illustrates the intimate connection between political parties and issue advocacy than the history of the birth of the Republican Party. In response

to the introduction of the Kansas-Nebraska bill in 1850,[3] groups of men from a variety of political affiliations, such as the Whigs, Know-Nothings, Free-Soilers, and even Democrats, abandoned their respective parties to unite over the slavery issue, and the Republican Party "emerged as a party of reform." Andrew W. Crandall, *The Early History of the Republican Party 1854-1856* 16 (1960). As one anti-slavery meeting organizer later explained, "We went into the little meeting held in a schoolhouse Whigs, Free Soilers, and Democrats. We came out of it Republicans . . . ." William Starr Myers, *The Republican Party: A History* 44 (1931).

6. Some Minor Parties.

Numerous minor parties have appeared on the political landscape focusing on issues of the day. For example, 1892 saw the rise of the Populist Party, which "called for national ownership of railroads, a graduated income tax, an increase in the money supply, and an eight-hour day for industrial workers." John A. Crittenden, *Parties and Elections in the United States* 36 (1982). In the late 1970s, the Citizens' Party united certain fans of Ralph Nader and Barry Commoner with activists in the environmental and disarmament movements. *Id.* at 260. The Libertarian Party believes only limited state interference with personal freedoms is permissible, along the lines of the writings of John Stuart Mill. The Socialist Labor Party and the Communist Party formed around particular political philosophies. The Prohibition Party formed around the issue of prohibiting alcoholic beverages. The Liberty Party got 2.3% of the presidential vote in 1844, and was important to the abolitionist movement. *Id.* at 112-13. The American Independent Party (George Wallace) arose over the issues of race, urban unrest, and Vietnam. *Id.* at 114. The issues of other parties are self-evident from their names, such as the Anti-Mason Party and the Free-Soil Party. In sum, there is a long history of minor

[3]The Kansas-Nebraska Bill, introduced by Senator Douglas of Illinois, would have allowed the two territories to make their own decision regarding whether to permit slavery within their borders. However, under the terms of the Compromise of 1820, slavery was prohibited in this area.

parties sprouting like mushrooms then withering, as issues capture the public attention and then fall from favor.

B. *Parties Promote Issues in Platforms.*

One of the premier ways that parties identify the issues for which they stand is through the adoption and publication of party platforms. The planks in place at the last presidential election show stark contrasts between the Republican and Democrat parties on the issues of the day. For example, on the abortion issue the Democratic plank stated: "Democrats stand behind the right of every woman to choose, consistent with *Roe v. Wade*, regardless of ability to pay, and support a national law to protect that right." Congressional Quarterly, *Congressional Quarterly's Guide to U.S. Elections* 181 (3d ed. 1994). By contrast, the Republican plank read: "We believe the unborn child has a fundamental individual right to life that cannot be infringed. We therefore reaffirm our support for a human life amendment to the Constitution, and we endorse legislation to make clear that the 14th Amendment's protections apply to unborn children. We oppose using public revenues for abortion . . . ." *Id.* at 187. The Republican National Coalition for Life identifies with the Republican Party because of this plank, stating at the bottom of a "Pro-Life Pledge of Support" form it seeks to have candidates execute: "*Respect for Life* — the *difference* between Republicans and Democrats." Republican National Coalition for Life, *Pro-Life Pledge of Support* (one page pledge form; copy on file in authors' office) (emphasis in original).

The recent Republican Contract with America is another premier example of how parties promote issues, not just candidates. The Contract identified key issues with which congressional Republicans identified. The issues included a balanced budget amendment, no U.S. troops under U.N. control, a $500-per-child tax credit, social security and welfare reforms, and other issues. *See, e.g.*, Jonathon Alter, *Decoding the Contract*, Time, January 9, 1995, at 26-27.

C. *Parties Promote Issues in Advertisements, As Petitioner Did.*

Parties promote issues through expenditures on issue advocacy, such as recent advertisements promoting Democratic budget priorities over Republican. The present case represents one of many such cases, where a party made an expenditure on issue advocacy with no candidate yet of its own and none yet nominated by the other party.

D. *Party Members Abandon Their Party Over Issues.*

Another form of evidence that party members support parties on the basis of issues is the way in which party members and even candidates switch parties as issues change. This shift in loyalties has happened throughout American history. From 1928 to 1937, leading up to and flowing from the New Deal, "[t]he flow of power to the Democrats . . . constituted the most astonishing political success since Jefferson's rout of the Federalists." John A. Crittenden, *Parties and Elections in the United States* 43. It represented a massive turning away from a Republican philosophy of rugged individualism. *Id.* at 42. The most notable recent migration has been from the Democrat Party to the Republican Party. Numerous recent articles have documented the movement of party members and officeholders from one party to the other. *See, e.g.*, Jeffrey H. Birnbaum, *Honey, I Shrunk the Party*, Time, July 3, 1995, at 25. Reasons focus on issues: "[Congressional Democrats] moan that Clinton has all but abandoned them on the central issues of the day," and "the Democratic Party 'remains intolerant to variances [by individual members] from its national party message on any issue.'" *Id.*

II. Political Parties Need Bright-Line Protection of Their Issue Advocacy.

Because political parties advocate issues, not just candidates, they need the same sort of bright-line protection of their issue advocacy afforded other entities. This is mandated by the First Amendment and the prior decisions of this Court.

A. *This Court Has Established Bright-Line Protection for Issue Advocacy.*

In a series of cases, this Court has drawn a distinction between electioneering, which may be regulated, and other expressions of free speech, including issue advocacy, which enjoy full First Amendment protection.[4] In order to constitute electioneering, as distinguished from issue advocacy, this Court has adopted a bright-line test — that the communication must "in express terms advocate the election or defeat of a clearly identified candidate for a public office." *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam).

This Court has long and carefully watched over efforts to regulate political speech in order to ensure that the guarantees of the First Amendment are not denied. This is because such restrictions "limit political expression 'at the core of our electoral process and of First Amendment freedoms.'" *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Not only has the Court afforded strong constitutional protection for political speech in general — including the right to urge the election or defeat of a candidate — but it has afforded exceptionally strong constitutional protection for issue-oriented speech in particular. As a result, this Court has repeatedly given a narrowing construction to statutes regulating political speech so as to permit prohibition or restriction of only express advocacy, in order to shield the statutes from constitutional attack.

In 1948, this Court considered the case of *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948) ("*C.I.O.*"). *C.I.O.* concerned a federal statute prohibiting a corporation or labor organization from making "any expenditure

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[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

in connection with a federal election." *Id.* at 106-107 n.1. Under this provision, an indictment was returned against the C.I.O. and its president for publishing, in *The CIO News*, a statement urging all members of the C.I.O. to vote for a particular candidate for Congress in an upcoming election. *Id.* at 108. In affirming a dismissal of the indictment, this Court observed:

> If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

Id. at 121.

A lengthy footnote appended to this statement set forth several passages from case law wherein the Court had declared the specially protected nature of free speech concerning public policy and political matters:

> "Free discussion of the problems of society is a cardinal principle of Americanism — a principle which all are zealous to preserve." *Pennekamp v. Florida*, 328 U.S. 331, 346 [(1946)].
>
> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 529-30 [(1945)].
>
> "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 [(1941)].

C.I.O., 335 U.S. at 121-22 n.21.

In 1976, this Court considered a successor statute to the one discussed in *C.I.O.*, The Federal Election Campaign Act of 1971, as amended in 1974. 2 U.S.C. § 431 *et seq*. This new statute was reviewed in *Buckley v. Valeo*, 424 U.S. 1. *Buckley* dealt, inter alia, with a provision which limited "'any expenditure . . . relative to a clearly identified candidate.'" *Buckley*, 424 U.S. at 41 (quoting 2 U.S.C. § 608(e)(1)). The provision placed a limit on the amount of an independent expenditure on behalf of a candidate. However, this provision was considered to be unconstitutionally vague. *Buckley*, 424 U.S. at 41. Therefore, the Court construed it with another provision of the same statute to require "'relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate." *Id.* at 42.

However, as the *Buckley* Court noted, this construction merely refocused the vagueness problem. The real problem, the Court noted, is that

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42.

Because of the problem described, this Court settled on the "express advocacy" test set forth in *Buckley* as marking the line of demarcation between the permitted and the forbidden. This test is constitutionally mandated because only a statute prohibiting the express advocacy of a clearly identified federal candidate has a

sufficiently bright line of distinction to make it constitutionally defensible. This Court, in *Buckley*, explained the problem with a quotation from *Thomas v. Collins*, 323 U.S. 516, 535 (1945):

> [W]hether words intended and designed to fall short of invitation would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43.

Thus, this Court, in *Buckley*, said that

> [t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) [placing a ceiling on independent expenditures] as limited to communications that include explicit words of advocacy of election or defeat of a candidate.

Id. Without such a clear line of demarcation, then, a speaker is forced to "hedge and trim" comments made on issues of public importance for fear he will be charged with forbidden electioneering. This is too heavy a burden on First Amendment Rights to be constitutionally permitted. It is noteworthy that, even as so narrowed, the ceiling on independent expenditures at issue in *Buckley* was struck down as not justified by a sufficiently compelling interest. *Id.* at 45. Such is the strength of the First Amendment protection of free expression.

The *Buckley* Court concluded that "[t]he constitutional deficiencies" of such unclear statutory language could only be cured by reading the statute "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for a public office." *Id.* at 44. The Court added that "[t]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

The *Buckley* Court proceeded to determine whether the statute, "even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression." *Id.* at 44. The Court determined that the government could not advance an interest in support of the statute sufficient to "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. The *Buckley* Court expanded on the subject of the First Amendment's powerful protection of political speech:

> [T]he First Amendment right to "'speak one's mind . . . on all public institutions'" includes the right to engage in "'vigorous advocacy' no less than 'abstract discussion.'" Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

Id. at 48 (citations omitted) (ellipsis in original).

The *Buckley* Court also quoted approvingly the comments of the United States Court of Appeals for the District of Columbia, which it affirmed:

> "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as

> well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

Id. at 42 n.50 (quoting 171 U.S. App. D.C. 172, 226, 519 F.2d 821, 875 (D.C. Cir. 1975)).

This theme of the strong First Amendment protection afforded issue advocacy was adopted by the United States Court of Appeals for the Second Circuit in *FEC v. Central Long Island Tax Reform Immediately Committee* ("*CLITRIM*"), 616 F.2d 45 (2d Cir. 1980) (en banc) (per curiam). The *CLITRIM* case dealt with whether an organization's failure to report funds expended to publish and distribute a leaflet advocating lower taxes and smaller government violated two statutory provisions. The first provision required "any 'person . . . who makes contributions or independent expenditures *expressly advocating* the election or defeat of a clearly identified candidate'" in excess of one hundred dollars to file a report with the FEC. *CLITRIM*, 616 F.2d at 52 (quoting 2 U.S.C. § 434(e)) (emphasis supplied by court). The second provision required "any person who 'makes an expenditure for the purpose of financing communications *expressly advocating* the election or defeat of a clearly identified candidate' . . . through media, advertising or mailing to state whether the communication is authorized by a candidate . . . ." *Id.* (quoting 2 U.S.C. § 441d) (emphasis supplied by court).

The *CLITRIM* court noted "the broad protection to be given political expression," *id.* at 53, as indicated by the Supreme Court in *Buckley*, and observed that

> [t]he language quoted from the statutes was incorporated by Congress in the 1976 FECA amendments to conform the statute to the Supreme Court's holding in *Buckley v. Valeo* that speech not by a candidate or political committee could be regulated only to the extent that the communications "expressly advocate the election or defeat of a clearly identified candidate."

Id. (citations omitted). The court further observed that limiting the statutes to reach only express advocacy "is consistent with the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution." *Id.* (citations omitted).

The *CLITRIM* court held that

> [t]he history of §§ 434(e) and 441d thus clearly establish that, contrary to the position of the FEC, the words "expressly advocating" mean[] exactly what they say. The FEC, to support its position, argues that "[t]he TRIM bulletins at issue here were not disseminated for such a limited *purpose*" as merely informing the public about the voting record of a government official. Rather the purpose was to unseat "big spenders." Thus, the FEC would apparently have us read "expressly advocating the election or defeat" to mean for the purpose, express or *implied*, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley v. Valeo* and adopted by Congress in the 1976 amendments. The position is totally meritless.

Id. (citations omitted) (emphasis in original).

In 1986, this Court again considered the constitutional protection afforded issue advocacy, in the case of *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986). In *MCFL*, the Supreme Court considered the contention of Massachusetts Citizens for Life, Inc. "that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," relying on *Buckley*. *MCFL*, 479 U.S. at 248.

The *MCFL* Court held that this rationale must be extended to restrictions on independent expenditures. *MCFL*, 479 U.S. at 249. The Court said that if a ceiling on independent expenditures, at issue in *Buckley*, had to be construed to apply only to express advocacy of the election or defeat of a clearly identified candidate (in order to eliminate the constitutional deficiencies described in *Buckley*), "this rationale requires a similar construction of the more

intrusive provision [at issue in *MCFL*] that directly regulates independent spending." *MCFL*, 479 U.S. at 249.

In sum, this Court has never recognized a compelling interest which would justify regulation of issue advocacy. Rather, it has held that the right to vigorously advocate issues is sacrosanct. Therefore, issue advocacy must be given a sufficiently wide berth to guarantee that corporations will feel free to exercise their constitutional right of free speech. *Buckley*, 424 U.S. at 78; *CLITRIM*, 616 F.2d at 54-55 (Kaufman, Chief Judge, joined by Oakes, Circuit Judge, concurring). Moreover, where government regulates near to this sacrosanct area, it must employ the bright line of demarcation between the permissible and impermissible set forth in *Buckley* and *MCFL*.

Finally, in *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom. FEC v. Keefer*, 112 S. Ct. 79 (1991), the First Circuit struck down the Federal Election Commission's regulations of voter guides which constituted issue advocacy as being beyond the authority of the FEC under 2 U.S.C. § 441b as interpreted by this Court in *MCFL*. The regulation at issue, 11 C.F.R. § 114.4(b)(5), required that a voter guide be "nonpartisan," which the FEC defined by six factors which may be considered in determining whether a voter guide is nonpartisan. The factors included consideration of whether a question is worded in a way that supports the position of a candidate on the issue covered and whether an editorial position on the survey questions, or an expression of support for or opposition to any candidate, is included in the voter guide. 11 C.F.R. § 114.4(b)(5)(i)(A)-(F).

The United States District Court for the District of Maine struck the regulations down for trespassing upon constitutionally-protected issue advocacy and for reaching beyond the authority of the Federal Election Commission. *Faucher*, 743 F. Supp. 64 (D. Me. 1990). The First Circuit affirmed the decision of the District Court. *Faucher*, 928 F.2d 468, declaring that "[t]he first amendment lies at the heart of our most cherished and protected freedoms. Among those freedoms is the right to engage in issue-oriented political speech." *Id.*

In sum, issue advocacy is constitutionally protected and no governmental interest has yet been found sufficiently compelling to permit infringement of this highly-protected free expression.

B. *There Is No Justification for Denying Bright-Line Protection to Issue Advocacy by Political Parties.*

Political parties need bright-line protection of their issue advocacy. According to the FEC, political parties — which exist in large part to advance identified political issues — should have less protection of their issue advocacy than corporations, unions, and banks.[5] However, political parties need the same bright-line protection for their issue advocacy other entities enjoy. Parties form and continue around identified issues. Parties seek to advance these issues by direct expenditures for communications, such as the advertisements at issue herein, not just by nominating and supporting ideologically compatible candidates. This issue advocacy is protected by the rights to free expression and free association guaranteed by the First Amendment. There is no justification for denying bright-line protection to issue advocacy by political parties.

Despite the facts that political parties need bright-line protection of their issue advocacy and that this Court has consistently protected issue advocacy, under the First Amendment, by employing the bright-line, express-advocacy test, the FEC insists that this should not apply to political parties. The FEC attempts to justify this notion principally on two bases: (1) the Colorado Party's[6] expenditure was really a contribution (allegedly subject to lesser protection) and (2) political parties pose sufficient danger of quid

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[5] 2 U.S.C. § 441b, as construed by this Court in *MCFL*, 479 U.S. 238, permits banks, corporations, and labor organizations to engage in issue advocacy without restriction, even in the political context, provided they do not expressly advocate the election or defeat of a clearly identified candidate for federal office.

[6] Your amicus will follow the convention employed by Petitioners in their *Petition for a Writ of Certiorari* of referring to Petitioners collectively as the "Colorado Party."

pro quo corruption that their issue advocacy may be restrained. As shall be shown, these asserted justifications are inadequate.

1. Contribution v. Expenditure.

Did the financial transaction by the Colorado Party in this case constitute a contribution or an expenditure, and does it matter? The statutory provision at issue herein states that:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any *expenditure* in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds [various amounts].

2 U.S.C. § 441a(d) (3) (Federal Election Campaign Act) (emphasis added). Despite the facts that the statute by its terms regulates *expenditures* and the Colorado Party clearly made an expenditure for the advertisement it ran, the FEC insists that the expenditure is really a *contribution*. This is so, according to the FEC, because the FEC treats all expenditures by a party as coordinated expenditures with a party's candidate (even if there is no candidate at the time, as in the case at bar), so that they become contributions to the candidate, not expenditures.

Of course, the reason why the FEC wants these expenditures to be contributions is that, in the FEC's view, this Court in *Buckley* gave the FEC greater latitude to regulate contributions than expenditures.[7] Did it?

In *Buckley*, this Court did make some distinctions between contributions and expenditures. However, there were also some important commonalities for constitutional analysis.

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[7]There is a certain bootstrap character to the argument that what would be protected issue advocacy for others is not for political parties because the FEC considers what would be expenditures by others to be a contribution for political parties.

By way of distinction, this Court in *Buckley* struck down an independent expenditure limitation on the basis that "expenditure limitations . . . contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19. "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. Also, there is justification for treating some expenditures as contributions, as this Court recognized in *Buckley* (of § 608(b)):

> In view of this legislative history and the purposes of the Act, we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations [on contributions] set forth in § 608(b).

Buckley, 424 U.S. at 46 n.53; *see also id.* at 24 n.25.

However, the underlying rationale shows that in the case at bar there should be no limitation on the Colorado Party's expenditures for issue advocacy. This Court expanded on its rationale for permitting a limitation on contributions in *Buckley* as follows:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but *does not in any way infringe the contributor's freedom to discuss candidates and issues*.

Id. at 22 (emphasis added). Thus, whatever else the terms "contribution" and "expenditure" mean, they do not include issue advocacy or the discussion of candidates. The FEC's interpretation of the statute at issue herein clearly infringes on the right of

the Colorado Party to discuss candidates and issues, which infringement *Buckley* forbids, even with regard to contributions.

This is also borne out by the language used to describe a "contribution" in *Buckley*:

> The Act does not define the phrase — "for the purpose of influencing" an election — that determines when a gift, loan, or advance constitutes a contribution. Other courts have given that phrase a narrow meaning to alleviate various problems in other contexts. [citations omitted] The use of the phrase presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution. Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.

Id. as 24 n.24. The reason there are "fewer problems" with the phrase "for the purpose of influencing" an election is because there is a common understanding of what constitutes a contribution — and the common understanding does not include issue advocacy. This is evident from the description used by the court of a "contribution." The *Buckley* opinion made clear that what makes a financial transaction either a "contribution" or an "expenditure" is whether — in the words of § 608(b) and similar statutes — the transaction is "for the purpose of influencing" an election or "with respect to an election," *id.* at 23-24 & n.24, and such terms were construed by this Court in *Buckley* to apply only to "explicit words of advocacy of the election or defeat of a candidate." *Id.* at 43-44, 78-79.

That the express advocacy test set out in *Buckley* was broadly applicable to other provisions regulating issue advocacy was evidenced in this Court's decision in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, and in the First Circuit's decision in *Faucher v. FEC*, 928 F.2d 468, described above.

In sum, whether or not the expenditure by the Colorado Party is properly characterized as a contribution or an expenditure, it may not constitutionally be regulated by the FEC because it was issue advocacy and criticism of an officeholder, all of which is protected expression, even for political parties.

2. Quid Pro Quo.

The other asserted justification the FEC gives for its regulation of the issue advocacy of political parties is the interest recognized as compelling in *Buckley*, namely, preventing actual or apparent corruption. *Buckley*, 424 U.S. at 53. In determining whether this interest justifies the regulation at issue herein, it is important to note the actual issue in this case. It is not about whether parties can be corrupt, or whether office holders can control or exact financial favors from parties, but whether there is the possibility of corruption in the exercise by a party of the right of free expression concerning issues and criticism of office holders from opposing parties.

The issue here, then, is whether expenditures by political parties for issue advocacy carry with them the risk of a quid pro quo exchange of "dollars for political favors." *FEC v. National Conservative Political Committee*, 470 U.S. 480, 497 (1985). In its briefing, the Colorado Party has demonstrated that modern political parties pose no threat of quid pro quo corruption to or from elected officials. Those arguments need not be repeated here. However, in the context of the present amicus curiae brief, two arguments are especially appropriate to reiterate: (1) parties are by nature voluntary and (2) candidates associate with parties on the basis of the prevailing views of the party. Because political parties form and survive on the basis of the issues they espouse, and because both candidates and party members voluntarily identify with parties on the basis of issues, there is no risk of quid pro quo exchanges resulting from expenditures by a political party for issue advocacy. As this Court said of *political action committees* in the *National Conservative Political Committee* case,

> [t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

Id. at 498. If this is true of PACs, then *a fortiori* there can be no corruption or appearance of corruption resulting from issue advocacy by political parties.

This Court has provided further guidance on whether the threat of corruption is posed by an organization such as a political party in the *MCFL* case. In *MCFL*, this Court considered a ban on independent expenditures ("in connection with" an election) by corporations, which was imposed by 2 U.S.C. § 441b. The Court reaffirmed the express advocacy test, but determined that an expenditure made by MCFL constituted express advocacy. *MCFL*, 479 U.S. at 248-49. Next, the *MCFL* Court evaluated whether there was any risk of corruption with regard to an MCFL-type organization which would justify such a ban on free expression. While *MCFL* considered whether an ideological corporation was sufficiently like a business corporation to justify the ban on using corporate dollars for independent expenditures, there are several transferable concepts to evaluating the threat of corruption posed by a political party. In *MCFL*, this Court held that a corporation posed no threat of corruption to the political system if it (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated with it so as to have a claim to its assets or earnings . . . ensur[ing] that persons connected with the organization will have no economic disencentive for disassociating with it if they disagree with its political activity"; and (3) the corporation "was not established by a business corporation or a labor union." *Id.* at 264. While a political party fits all three of these factors, the second is especially applicable to the present discussion.

The concern raised by the FEC in *MCFL* was that § 441b served to prevent "corruption," *id.* at 259, by "prevent[ing] an organization from using an individual's money for purposes that

the individual may not support." *Id.* at 260. "This rationale for regulation is not compelling with respect" to MCFL-type organizations because "[i]ndividuals who contribute to [an MCFL-type organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *Id.* at 260-61. "[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *Id.* at 261. "Finally, a contributor dissatisfied with how funds are used can simply stop contributing." *Id.*

Political parties similarly pose no risk of corruption because people give money to parties precisely because they support what the party stands for. A contribution to a party is for the purpose of enhancing advocacy of the issues the party represents. Any individual unhappy with the use of the money may simply quite contributing and leave the party.

In sum, issue advocacy by political parties poses no threat of corruption. There is no justification for limiting the issue advocacy of political parties.

III. Failure to Provide Bright-Line Protection for Issue Advocacy by Political Parties Would Have Negative Implications for Other Groups.

The central troubling feature of this case is the FEC's refusal to heed the instruction of this court with regard to the constitutional mandate of bright-line protection for issue advocacy. While this Court clearly set out the broadly-applicable express advocacy test in *Buckley*, the FEC has since refused to apply the express advocacy test in broader contexts unless legally compelled to do so. This has led to defeats for the FEC position in the *MCFL* and *Faucher* cases, as noted above, which applied the express advocacy

test to broader areas of issue advocacy which the FEC has sought to regulate.[8]

Presently, litigation has once again been necessary to challenge new FEC rules attempting to regulate issue advocacy in voter guides, an issue already decided (against regulation) in the *Faucher* case, on the basis of this Court's decisions in *Buckley* and *MCFL*.[9]

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[8]In fact, this intransigence led Chief Judge Kaufman of the Second Circuit to comment of the FEC, in *CLITRIM*, 616 F.2d at 53-54 (Kaufman, Chief Judge, concurring) that

> [T]he insensitivity to First Amendment values displayed by the Federal Election Commission (FEC) in proceeding against these defendants compels me to add a few words about what I perceive to be the disturbing legacy of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431, *et seq.* . . . Indeed , before *Buckley v. Valeo* . . . the Supreme Court had emphasized that freedom to criticize public officials and oppose or support their continuation in office constitutes the "central meaning" of the First Amendment. . . . If speakers are not granted wide latitude to disseminate information without government interference, they will "steer far wider of the unlawful zone," . . . thereby depriving citizens of valuable opinions and information. This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled, or sterilized. . . . The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees. *Buckley v. Valeo*, *supra*, imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our decision today should stand as an admonition to the Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility.

[9]On February 13, 1996, the United States District Court for the District of Maine declared the latest regulations of the FEC governing issue advocacy (11 C.F.R. § 100.22) to be "invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *Massachusetts Citizens for Life*, 479 U.S. 238, and by the United States Court of Appeals for the First Circuit in *Faucher*, 928 F.2d 468, because it extends beyond issue advocacy." *Maine Right to Life Committee* (continued...)

This despite the fact that *Buckley* was decided two decades ago and consistently followed by this Court when presented with opportunities to apply the express advocacy test. Yet, in the case at bar, the issue is once again presented of whether this Court meant what it said when it held that issue advocacy is protected by the First Amendment rights of free expression and association and must have room to breathe so that speakers need not hedge and trim to avoid vague laws.

Concomitant with the FEC's desire to regulate issue advocacy is its desire to reject the formulation of this Court for what constitutes the bright line between issue advocacy and electioneering. In *Buckley*, this Court construed the statute at issue there (in order to avoid constitutional difficulties) "to apply only to expenditures for communications that in *express terms* advocate the election or defeat of a clearly identified candidate for a public office." *Id.* at 44 (emphasis added). The Court added that "[t]his construction would restrict the application of § 608(e)(1) to communications containing *express words* of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52 (emphasis added). It is clear from *Buckley* that a determination of whether a communication expressly advocates the election or defeat of a clearly identified candidate is to be made from the words of the communication itself.

In this case the FEC once again urges its totality of the circumstances test. This test, adopted by the Ninth Circuit in the case of *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert. denied* 484 U.S. 850 (1987), looks not just at the context of a

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[9](...continued)
v. FEC, No. 95-261-B-H, slip op. at 12 (D. Me. Feb. 13, 1996) (opinion and order granting declaratory relief). The Maine District Court struck down a definition of "[e]xpressly advocating," *id.* at 5, which "comes directly from" *Furgatch*. *Id.* at 7; *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). The *Furgatch* decision is discussed *infra*. The Maine District Court relied on the fact that, contrary to the Ninth Circuit's decision in *Furgatch*, this Court in *Buckley* and *MCFL* created a bright-line protection of issue advocacy, "even at the risk that it is used to elect or defeat a candidate." *Id.* at 10.

communication to determine if the communication is electioneering. It is important to note that the *Furgatch* test was decided in, and is rightly applicable to, a very narrow context. *Furgatch* was about disclosure provisions. The *Furgatch* court noted this "Court's directive that, where First Amendment concerns are present, we must construe the words of the regulatory statute precisely and narrowly, only as far as is necessary to further the purposes of the Act." *Id.* at 861. The court then devoted a full page to discussing the importance of disclosure, the purposes served thereby, and the minimal burden imposed by disclosure. *Id.* at 862. Because it concluded that disclosure "serves an important Congressional policy and a very strong First Amendment interest," and because the burden imposed would be "minimally restrictive," the Ninth Circuit adopted a totality of the circumstances test. *Id.*

However, the case at bar is not about the minimal burden of a disclosure requirement. It is about a prohibition on issue advocacy, such as the Supreme Court considered and rejected with regard to a cap on independent expenditures in *Buckley*, 424 U.S. at 45-46, and with regard to a bar on independent expenditures by MCFL-type corporations. *MCFL*, 479 U.S. 238. The FEC would take a rule created by the Ninth Circuit in the context of a minimal-burden disclosure situation and apply it across the board, even in the maximum-burden situation where speech is barred. That is too heavy a burden on the vital freedoms of expression and association to be constitutional.

This totality of the circumstances test was proposed by the FEC in *Faucher* and rejected by the First Circuit. *Faucher v. FEC*, 928 F.2d 468. It has now been adopted by the Tenth Circuit in the present case. According to the Tenth Circuit, the line between issue advocacy and electioneering is not determined by express words of advocacy, but by whether a reasonable person would believe that the communication tended to "diminish" public support for an opposing (unnominated) candidate and "garner support" for one's own possible (though not yet identified) candidate. *FEC v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015, 10 (1995). This determination may be

made from a totality of the circumstances, not the express words of the communication itself.

The problem with this sort of test is simple: it forces issue advocates to hedge and trim lest the FEC decide, based on circumstances beyond the communication itself (including even those outside the control of the communicator), to bring an enforcement action and seek to demonstrate an intent to electioneer. The bright-line, express advocacy test was imposed by this Court on the FEC precisely to prevent the burden on First Amendment rights resulting from such vagaries. The Colorado Party briefs the flaws of this sort of test extensively, and those arguments need no further development here.

However, there is an important point which needs to be made in the context of this brief focusing on issue advocacy. That point is that abandoning the bright-line approach to protecting issue advocacy will fuel the efforts of those who want to encroach on the right to engage in issue advocacy. Abandoning the bright-line rule of *Buckley* and *MCFL* will create a principle that will be built upon to limit vigorous issue advocacy, resulting in loss of First Amendment rights and ongoing litigation. The right of free expression about issues is of such paramount importance in our republic that no encroachment upon it must be permitted. To that end, a bright-line rule is essential.

In sum, this Court should retain its bright-line, express advocacy protection for issue advocacy and evaluate communications under this test only in the context of the communication itself and its express words. The First Amendment requires no less.

CONCLUSION

For the reasons stated in this brief, your *amicus* respectfully prays this Court (1) to recognize that the First Amendment to the Constitution of the United States mandates bright-line protection for the issue advocacy of political parties and (2) to reverse the decision of the United States Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS L. JONES, AS TREASURER,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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INTERESTS OF AMICUS CURIAE[1]

The Committee for Party Renewal is a voluntary, bipartisan association of some 500 political scientists and practitioners committed to strengthening political parties in the United States. Since its inception in 1975, the Committee has worked towards revitalizing and rebuilding political parties. This effort is founded in the belief that political parties are essential to unify and give coherence to the American political system, and to maintain an effective democracy. As part of its goal, the Committee has urged that political parties be able to provide unlimited financial support for their candidates for public office. The Committee is strongly opposed to the notion put forth by the United States Court of Appeals for the Tenth Circuit that party financial support of candidates is, or appears to be, corrupting.[2]

Herbert F. Alexander is a professor of political science at the University of Southern California; John F. Bibby is a professor of political science at the University of Wisconsin-Milwaukee; William E. Hudson is a professor of political science at Providence College; Dr. Philip Klinkner is a professor of government at Hamilton College; Jerome M. Mileur is a professor and graduate program director at the University of Massachusetts-Amherst; Gerald M. Pomper is a professor of political science at Eagleton Institute of

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[1] Counsel for petitioners and counsel for respondent have consented to the filing of this brief. Written consent is on file with the Clerk.

[2] *See also* Appendixes A-C, containing the Committee for Party Renewal's *Declaration of Principles*, *Principles of Strong Party Organization*, and *Statement on Campaign Finance*.

Politics, Rutgers University; Professor A. James Reichley is Visiting Senior Fellow at Georgetown University; Dr. Gary L. Rose is a professor of political science at Sacred Heart University; David K. Ryden, Ph.D., J.D., is an assistant professor of political science at Hope College; Larry Sabato is a professor of government at the University of Virginia; Howard Scarrow is a professor of political science at State University of New York at Stony Brook; John K. White is a professor of political science at the Catholic University of America and co-chairman of the Committee for Party Renewal. These political scientists believe that political parties play an integral role in maintaining a strong, effective democracy in this country.

SUMMARY OF ARGUMENT

The Federal Election Campaign Act ("FECA" or "Act") imposes strict limitations on the ability of political parties to support their candidates financially. The parties' inability to make expenditures on behalf of candidates beyond the Act's monetary limits has the effect of severely curtailing the parties' ability to express support for candidates in any way. Thus, the Act's limitations are an extreme infringement on the parties' freedom of speech and association, and the Act chills the very sort of speech meant to be protected by the First Amendment.

This Court has held that the only compelling interests that can support the Act's infringement on constitutionally protected political speech are actual corruption, or the appearance of corruption. Absent a showing that political parties' financial support of candidates leads to corruption,

or the appearance of corruption, the Act's infringement on parties' freedom of speech cannot be sustained by this Court.

Political parties play a unique and crucial role in our democratic system of government. Parties enable citizens to participate coherently in a system of government allowing for a substantial number of popularly elected offices. They bring fractured and diverse groups together as a unified force, provide a necessary link between the distinct branches and levels of government; and provide continuity that lasts beyond terms of office. Parties also play an important role in encouraging active participation in politics, holding politicians accountable for their actions, and encouraging debate and discussion of important issues.

In upholding the Act's limitations based on the corrupting influence of political parties, the United States Court of Appeals for the Tenth Circuit demonstrates an acute misconception of the role of the political party in the functioning of our democracy. Political parties are not political action committees ("PACs") or special interest groups. To succeed, parties need the support of diverse groups of citizens who represent many views and concerns. Thus, parties must speak to broad, common interests on questions of major concern. They are fundamentally different from groups focused on the special interests of their members.

The Court has upheld limits on contributions against First Amendment challenges because contributions are symbolic in nature; the quantity of communication by a contributor does not increase with the size of the donation. But this rationale does not apply to financial support from political

parties, whether such support is viewed as an in-kind contribution or an expenditure. Financial support by a party on a candidates' behalf is not symbolic. A party's ability to advocate on its candidate's behalf is substantially impaired by the Act's limit on financial support, regardless of how the government chooses to categorize that support.

Simply put, political parties are not corrupting. Moreover, the Act's limitations on parties' ability to spend money on behalf of their candidates *increases* corruption, or at the very least, the appearance of corruption, in the financing of political campaigns. The funding gap created by the limits placed on political party expenditures is filled by PACs committees and special interest groups. The public perceives the increased influence of PACs and special interest groups as corrupting. Thus, the Act erodes, rather than restores, the public's confidence in the purity of the election process.

ARGUMENT

I.

Provisions of the Federal Election Campaign Act limit the freedom of speech and association of political parties as guaranteed by the First Amendment of the United States Constitution

The Federal Election Campaign Act, 2 U.S.C. §§ 431-455 (1994), imposes strict limitations, with civil and criminal sanctions for violations, on the amount of contributions or expenditures by political parties to, or for, their federal candidates. § 441a. These limitations affect political organizations at every level - national, state, county or

precinct. They limit money, goods, and services given by a political party to a candidate. § 431. For example, a state party can contribute no more than $5,000 per election to a candidate for the United States House of Representatives or Senate. § 441a(d). In 1995, a state party could spend no more than $30,060 in coordinated expenditures for a party House candidate. *Id.*; 11 C.F.R. § 110.9 (1995). With the increasing costs of campaigns,[3] state party committees are being relegated to an ever decreasing role in congressional campaign funding. The Act's limitations restrict one of the traditional and most fundamental activities of political parties: providing financial and material support to candidates. Unfortunately, the restrictions on state parties are mirrored in similar restrictions on national and local party committees. *See* 2 U.S.C. § 441a(d).

Dollar limitations on party expenditures are in reality a limitation on all party political activity and political speech. Few party political activities can be performed on behalf of a candidate without some expenditure of funds. A party leader can express support for a candidate, but must spend money to ensure this support will be heard by more individuals than those within earshot. As this Court stated in *Buckley v. Valeo*:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues

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[3] *See* FEC Press Release, *1994 Congressional Fundraising Sets New Record* (Nov. 1995) (noting a seven percent increase in funding in the 1994 congressional elections over the 1992 elections).

> discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

424 U.S. 1, 19 (1976). This Court drew an apt analogy in reference to independent expenditures which applies equally to political party expenditures: "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . includ[ing] discussions of candidates . . . ." *Id.* at 14 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The FECA's limitation on party activity has had a frighteningly chilling impact on parties' exercise of their First Amendment rights. This "chill" affects the daily function of political parties at the local, state, and national levels. Every day the Act limits the discussion of government affairs, including discussion of candidates. For example, every party organization must have each of its publications, such as

letters or newsletters, reviewed to determine whether particular communications might be construed as advocating the election or defeat of a candidate for federal office. If a party organization has already contributed or expended the maximum amount permitted by the Act, this communication would have to be edited to remove any language advocating an individual for federal office. If such publications were not so "sanitized," the costs of production and dissemination would be considered contributions to, or expenditures for, particular candidates; hence, a violation of the law.

The Act puts political parties in the bizarre position of having to refrain from backing the election or reelection of their candidates in general communications for fear of violating the law. The Orwellian exercise of party lawyers determining what statements parties may or may not lawfully make, depending upon the cost of disseminating those statements, is remarkably inhibiting. This is especially so when Federal Election Commission ("Commission") officials may review those determinations and impose civil and criminal sanctions for mistakes.

Local party activity is particularly "chilled" because of FECA limitations and restrictions. The Commission has taken the position that local or county party committees share generally a single contribution limit with a state party, so if a state political party has contributed the "limit" to a candidate, no local or county committee can make *any* contribution to that candidate. 11 C.F.R. § 110.3(b) (1995). Thus, a local party's speech is not merely limited - it is prohibited.

Furthermore, local party organizations often lack the infrastructure to fully understand and comply with the Act. Most local party committees and some state party organizations are staffed substantially by volunteers. Volunteer participation in our political process is paid verbal homage by every politician, but ensuring compliance with the present complex limitations of the Act demands professional staff at every level of political activity down to the grass roots level. It is unreasonable to expect that volunteers will understand the various contribution and coordinate expenditure limits of the present law. Indeed, few lawyers truly understand the regulations and limitations.[4]

II.

The only compelling interests recognized by this Court supporting the Act's limitation on political speech are the risk of actual corruption or the appearance of corruption.

"Reason is the life of the law." Sir Edward Coke, *First Institute* (1928). Is reason alive in this law? There is no rational, much less compelling, policy interest in limiting

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[4] "I am an attorney, but not a technical expert on the Federal Election Campaign Act. The fact that an attorney with substantial political experience cannot claim to be an expert on the Act immediately highlights the most fundamental difficulty with the Federal Election Campaign Act. When Congress passes this Act, it created a new legal specialty -- federal election law attorneys. This small cadre of individuals seems to be the only ones who understand completely the myriad rules and regulations." Richard Richards, former chairman of the Republican National Committee, Statement before U.S. Senate Committee on Rules and Administration, Nov. 20, 1981.

party activities on behalf of candidates. In *Buckley*, this Court recognized that:

> the primary interest served by . . . the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.

424 U.S. at 25.

This Court later reaffirmed that preventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests that can support expenditure or contribution limits:

> We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances. In *Buckley* we struck down the FECA's limitation on individuals' independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find § 9012(f)'s limitation on independent expenditures by political committees to be constitutionally infirm.

FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985). Thus, unless a party's financial support of its candidates is somehow corruptive, or appears

to be corruptive, the government has no compelling interest in limiting such activity.

III.

The United States Court of Appeals for the Tenth Circuit shows a fundamental and profound misunderstanding of the role and function of political parties in our political system. Political party support of its candidates is not corrupting.

No conventional concept of corruption delineates the candidate-party relationship. There is ample support in the political science literature for the proposition that party funding is the least corrupting source of campaign support.[5] The important and unique role of parties is clear to any thoughtful and informed observer and has been recognized in numerous decisions of this Court.[6]

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[5] *See, e.g.*, A. James Reichley, *The Life of the Parties* 386-94, 419-22 (1992); David Magleby & Candice Nelson, *The Money Chase* (1990); Michael Malbin, *Money and Politics in the U.S.* (1986); Herbert F. Alexander, *Comparative Political Finance in the 1980s* (1989); Nelson W. Polsby, *Consequences of Party Reform* 178 (1983); John K. White & Jerome M. Mileur, *Challenges to Party Government* (1992); David K. Ryden, *Representation in Crisis* (1996).

[6] *See, e.g.*, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 244 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-15 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975); *Storer v. Brown*, 415 U.S. 724, 728-29 (1974); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

There is "no America without democracy, no democracy without politics, and no politics without parties . . .".[7] These opening words from Clinton Rossiter's work on American political parties are as true today as when they were first written more than thirty years ago. There is not a true democracy in the world that does not have free and active political parties.

In the view of almost all political scientists, parties are the most important instruments for achieving effective democracy.[8] Political parties, as they evolved in this country, have greater importance than in other Western democracies for a myriad of reasons:

- Parties promote agreement between different interests and groups. In our individualistic, pluralistic, sometimes fractured country, we need unifying forces. Because parties want above all to win elections, they work to compromise differences for the common cause.

- Parties promote discussion of major issues. A party seeks support for a program, not only individuals. By presenting a platform, or a legislative agenda such as the "Contract with America," the "New Deal" or the "Great Society," a party organizes the choices facing

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[7] Clinton Rossiter, *Parties and Politics in America* 1 (1960).

[8] *See* John H. Aldrich, *Why Parties?* 18 (1995).

the electorate, and helps voters to make informed decisions.

- Parties foster effective government. Deadlock and gridlock always threaten the American governmental system because of the division of power among the three federal branches and the national and state governments. Parties provide one important means to link these competing centers of power.

- Parties provide responsibility and accountability. When they make decisions on public issues, parties accept a collective obligation to further the public interest as they see it. The voters then know whom to praise or blame for the results of government action.

- Parties promote participation. They work hard to enroll voters. They combat cynicism about politics by giving citizens a way to join with others, to contribute time and money, and to become involved in exciting, enhancing, and effective, political action.[9]

Political parties, as we know them, are an American invention. Parties were not accidents of history. Our

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[9] According to a 1992 study conducted by the National Opinion Research Center and The American National Election Survey (unpublished), persons who were affiliated with the Democratic and Republican Party were more likely to have voted, to be interested in, pay attention to, or care about the results of, the presidential election, than persons unaffiliated with a political party, by significant margins.

earliest political leaders realized that they were essential in bringing order to America's tripartite form of government. Thomas Jefferson and James Madison devised them as means of changing the policy directions of government. *See* Aldrich, *Why Parties?*, at 68-95. Later, Andrew Jackson and Martin Van Buren revised them as a means of expanding popular participation in government. *Id.* at 97-156. Since the earliest days of our Republic, they have, albeit imperfectly, continued to serve these ends. Parties are the only broad-based, multi-interested organizations in this country that can nominate candidates for office, mobilize popular support behind them, and organize those elected into a government. Unlike special-interest groups, parties must appeal to majorities in the electorate if they are to win; and unlike single-candidate organizations, they must win many races if they are to govern. Parties, moreover, give coherence to American politics. We have a constitutional system and a political culture dominated by disunifying forces -- separated powers, federalism, pluralism, and individualism. Parties have been a unifying force in this system, cutting across the branches and levels of government as well as across voting blocs to aggregate interests, build coalitions and make mass democracy possible.[10]

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[10] "There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change." *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring).

Individual candidate organizations do not provide the men and women they support with programs or principles. Single-issue groups lead to fragmented government, the neglect of broader policy needs, and the neglect of needs of citizens not represented by groups. Broad-based political parties, on the other hand, can compromise and incorporate the wishes of a wide range of citizens in programs that encompass a multitude of issues and stretch across a greater time span than a term of office. They can marshall the resources and develop the strategy to recruit, train, support and guide a succession of highly qualified individuals to advance those programs during their terms in office. Political parties provide an effective means of holding elected representatives accountable to the people who elect them on the basis of their parties' programs, sometimes they show themselves ready to deny renomination to incumbents who have acted contrary to those programs. They are able to put forward a broad panel of spokespersons in defense of their programs, informing and educating the citizenry in a debate that extends well beyond the short-range electoral prospects of particular candidates.

In short, only political parties can provide us with the cohesion, continuity and accountability necessary to make democracy work. Political parties are the only broad-based, popular intermediaries between the people and their government. Voters use them to steer government in directions they wish it to go. When political parties work, government works. When they do not, government falters and drifts.

It is interesting to note that the primary way we measure the increased democratization of the former "captive nations"

of Eastern Europe is the spread of political parties through the region. As Poland, Czechoslovakia and Hungary - to name but a few examples - make clear, political parties give voice to the many in the pursuit of great ideas. What is true for Eastern Europe also holds for the United States.

In all democratic nations political parties have the purpose of controlling and directing the struggle for political power. Political parties in the United States do this, but are also unique in that they provide a framework for the accommodation and consensus development which our political system must have to function. The party system, when it operates properly, overcomes the handicaps to governance imposed by the separation of powers.[11] In other words, the U.S. government is not solely a party government as Great Britain's, it is also a constitutional government, and the parties are needed to guide the various levels of government authority into an integrated, functioning system.

More public officials are popularly elected in the United States than in any other nation. The parties also provide a rational basis for voter decision-making among the myriad known, little-known, or unknown individual candidates who run for office in this country. Candidates nominated by political parties represent certain views and philosophies. Although there is a wide range of differences within a party, party identification has a symbolic meaning for the electorate, and the party platform and goals provide a means of evaluating a candidate.

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[11] V.O. Key, Jr., *Politics, Parties, and Pressure Groups* (1942).

Political party support is not corruptive nor does it appear to be corruptive.[12] Corruption is an impairment of integrity or the exercise of improper and undue influence. A political party's financial support to its candidates does not constitute corruption. Parties and their candidates share an identity of self interest in elections - this is a symbiotic, not a corrupting, relationship. The notion that party support corrupts candidates runs counter to virtually every theory of political parties' functions in the United States.[13] One of the major purposes of political parties is to sponsor candidates who represent the diverse, but coherent ideas encompassed in party philosophy.

As a source of campaign funds, American parties probably constitute the cleanest money in politics. Recognizing that political parties are large aggregators of many contributions diffuses any real or perceived undue influence that might arise from a financial contribution.

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[12] In their brief submitted to the Tenth Circuit, the Commission offered examples of corrupt party organizations to bolster their argument that party support can be corrupting. However, the Commission could refer only to nineteenth century scandals such as Tammany Hall and Custom House, and the more recent Teapot Dome and Watergate scandals. Teapot Dome involved the misdeeds of a cabinet member and Watergate arose out of the corruption of a candidate's campaign committee - neither involved corrupt political parties. Brief of the Federal Election Commission, at 27 n.6. It is undeniable that all organizations of human beings can be corrupted. This universal shortcoming of our species could provide the basis for restricting the political speech of any organization or individual. Surely, this Court is "chilled" by the prospect of the government determining what political speech by whom is corrupting and in what measure.

[13] *See, e.g.*, Leon Epstein, *Political Parties in the American Mold* (1986).

Most politicians are honest. However, most are also distracted, many appear influenced, and some may even be corrupted, by the demands of fundraising. Parties are too large and too diverse to be controlled by any special interest. The old rule of sanitary engineers applies: the solution to pollution is dilution.

The Solicitor General asserts that "[t]here is no basis for petitioners to attempt to distinguish party committees from other political committees subject to the contribution limits upheld in *Buckley*."[14] This statement reflects a woeful ignorance of the role of political parties in our system - a level of ignorance that renders further analysis from this source virtually worthless.

Parties are not the same as interest groups. For a party to function it must speak but, at least if it expects to win a majority, it must speak for broader concerns, for some combination of particular claims, for some overall approach to public issues. Parties raising money from many contributors also must listen, but they must listen to majorities rather than any one particular group.[15] Listening to majorities is what we call democracy. Political parties are

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[14] Brief for respondent in opposition to the petition for writ of certiorari, at 10.

[15] "Broad-based parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interest that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue." *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting).

the most comprehensive and potentially most effective form of political association through which ordinary Americans can influence the direction of their government. We should prize them as the cornerstones of representative democracy and work to assure their vitality.

There is no basis in American political theory or practice for any limit on political party contributions to candidates. Unlike PACs and even individuals, there is no risk of a party corrupting a candidate by giving him or her a large sum of money. The party and the candidate clearly share a common interest in the candidate winning the election, and they presumably share a common interest as well on at least major questions of public policy. Enabling parties to fund candidates at higher levels would encourage candidates to rely more on their parties for financial support, and an enlarged role for parties is probably the best way to check the growing influence of PAC money in congressional campaigns. Increased funding would also help parties recruit stronger candidates and increase competition for office. Competition is probably the single best guarantee that the public interest will be protected. Moreover, a larger role for parties would increase their leverage with candidates and mean a better chance of achieving a greater degree of policy agreement and discipline in government.

Much has been written about the so-called alarming rise of PACs.[16] Whether PAC contributions pose a threat of corruption can be reasonably debated. While PACs,

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[16] *See generally* Brooks Jackson, *Honest Graft* (1988); Larry J. Sabato, *PAC Power* (1984); Reichley, *The Life of the Parties*, at 366-70; Amitai Etzioni, *Capital Corruption* (1984).

independent expenditure groups, and other organizations allow citizen participation, they still serve single or narrow interests. A limitation on their contributions can be analyzed as a check on the appearance of undue influence or corruption.[17] Parties, on the other hand, serve as an umbrella for heterogenous concerns. There is no plausible reason for limiting a party's contributions to its own candidates. Parties cannot corrupt a candidate. They share a common, valid purpose, winning the election and promoting a policy agenda. When a party gives money to a candidate, it promotes the marketplace of political ideas by expressing its vision of the common interest and enabling voters better to understand, accept or reject that vision.

In *FEC v. National Conservative Political Action Committee*, this Court reiterated its position from *Buckley v. Valeo* that "PACs' expenditures are entitled to full First Amendment protection." 470 U.S. at 496. Are party expenditures also not entitled to full First Amendment protection? There is no reason why party committees should be disadvantaged vis-a-vis independent groups and PACs. Limitations on party activity are nonsense. Why the United Auto Worker's PAC or the National Conservative PAC or any of the myriad other groups representing legitimate expressions of special interests can spend an unlimited amount of money supporting candidates, and the Republican or Democratic Parties cannot, is baffling. All political committees, with the exception of party committees, are

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[17] "Who contributes to campaigns and why? For some it is a matter of citizenship . . . and for virtually all PACs, something more tangible is expected." Edward Schneier & Bertram Gross, *Congress Today* 65 (1993).

entitled to make unlimited independent expenditures on behalf of any candidates for federal office. Yet expenditures by party committees on behalf of their candidates are deemed "coordinated expenditures" or in-kind contributions, both subject to strict limits.

The Commission has adopted regulations expressly prohibiting independent expenditures by party committees. 11 C.F.R. § 110.7(b)(4) (1995). The Commission argues that any expenditures by the party on behalf of its candidates should be analyzed by this Court as contributions rather than expenditures by the party for their candidates.[18] This is the Commission's sole rationale for parties to be subject to an expenditure limit that is placed on no other political committee. This Court's analysis as to why contributions can be subject to stricter regulation than expenditures is found in *Buckley*:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the

[18] Brief for the respondent in opposition to the petition for writ of certiorari, at 8-9.

> expression rests solely on the undifferentiated, symbolic act of contributing.

424 U.S. at 20-21.

A limit on political party contributions or expenditures is not a "marginal" restriction upon its ability to engage in free communication. A party expenditure enables it to communicate party views to the general public. It is not a "symbolic act." It does not have as its primary purpose an indication to the candidate that the party supports his candidacy or positions. The quantity of communication *does* increase perceptively with the size of the party's expenditure, the amount of political advocacy. The Court's analysis explaining why contributions can be subject to greater limitations does not justify this impairment of party speech rights. Whether the party expenditures limits in the Act are analyzed as in-kind contributions or expenditures by this Court is immaterial. There is no basis for limitations on party expenditures or contributions.[19]

There are only a few possible sources of campaign money. It can come from the individual candidates, at the risk of restricting major offices to the wealthy, leading to government of and by the rich. It can come from individuals and group contributors, such as PACs, exposing legislators to the influence of special interests, and to the voters' suspicion of corruption.[20] It can come from government,

[19] *See generally* Eric L. Richards, *The Rise and Fall of the Contribution/Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms*, 18 New Eng. L. Rev. 367 (1983).

[20] John Wright, *Interest Groups and Congress* (1996).

but public financing is both clumsy and politically infeasible. Campaign finance is a choice of alternatives. Compared to these other sources, party support runs the *least* risk of corruption or the appearance of corruption.

IV.

The restriction in the Act on political parties' support of their candidates has the effect of increasing the risk of corruption or the appearance of corruption in the financing of political campaigns - the exact opposite of the only legitimate justifications for such a restriction on First Amendment rights.

The Court of Appeals observed that "[t]he members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties." *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1024 (10th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3458 (U.S. Jan. 9, 1996).

This statement is based upon the false predicate that the party limitations contained in the Act were enacted for the purpose of limiting corruption or the appearance of corruption from large coordinated expenditures by political parties. There is absolutely no support for this conclusion in any legislative history of the Act. Numerous other reasons have been postulated for the various limits in the Act, such as the equalization of resources or the reduction of campaign costs. *See Buckley*, 424 U.S. at 28-29; *see also*

Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981). The Court of Appeals' assertion that this particular part of the Act represents a concern of Congress about the corrupting influence of party support of a candidate is without any historical foundation and is not supported by any practical analysis.

One will search in vain for any reference in the congressional debate or discussion of the Act or any of its subsequent amendments for an expression of an intent or desire to weaken political parties.[21] Nevertheless, the specific provisions of the Act which limit party expenditures and contributions can be isolated and are known to have the unintended, but undeniable effect of weakening political parties and strengthening the competitive position of other entities for political influence in our system.[22]

The present law creates an environment in which special-interest PACs and single-interest groups have become more important competitors of parties for political influence.[23]

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[21] Federal Election Commission: Legislative History of Federal Election Campaign Act Amendments of 1974 (1977); Legislative History of Federal Election Campaign Act Amendments of 1977 (1977); Legislative History of Federal Election Campaign Act Amendments of 1979 (1979).

[22] "The growing importance of PACs can be traced to the 1972 law reforming campaign finance." Scheier & Gross, *Congress Today*, at 65; *see also* Frank Sarauf & Scott Wilson, *Campaign and Money*, in *The Parties Respond* 191 (Sandy Maisel ed., 1990).

[23] William J. Keefe, *Parties, Politics, and Public Policy in America* 140 (5th ed. 1988); David E. Price, *Bringing Back the Parties* 249 (1984).

Present law has endowed PACs with substantial advantages over party committees. Instead of broad-based, coalition-forming parties being the predominant support factor in campaigns, single and special-interest organizations continue to move toward predominance. Campaign financing laws limiting party activities are affecting the relationship between candidates and their parties and the relative power of interest groups and political parties. They inevitably change the nature of our political system and the coalitional governance that has made it so stable. When candidates and parties are interdependent, political responsibility is enhanced. When candidates are not dependent on parties for funds and material support, holding elected officials accountable becomes more difficult. The more a candidate depends on the party, the greater the party's ability to apply its leverage to achieve policy coherence and mobilize party majorities in Congress. Since it is easier to get two parties to agree than a group of contentious, independent individuals, national unity and consensus are more attainable when parties are strong.

Allowing unrestricted party expenditures for candidates would also help to recruit more diverse and stronger candidates, particularly challengers and open-seat contestants. With significant funds available from parties, candidates would be better able to resist any improper demands by individual contributors or PACs. The result would be increased and cleaner competition for political office. Such competition is the best guarantee that the public interest will be protected.

With diminished party strength came a new politics, characterized by excessive media influence, political fad-of-the month clubs, massive private financing by various "fat cats" of state and congressional campaigns, gun-for-hire campaign managers, lowered concern for policy, and maneuvering and management by self-chosen political elites. The composition of political parties had a significant impact on the operations of the federal government. David Broder wrote: "The governmental system is not working because the political parties are not working." David Broder, *The Party's Over* xxiii (1972).

Since Broder completed his book in 1972, the linkages between the party-in-the-electorate and the party-in-government have become increasingly frayed. Fewer Americans than ever before identify with a political party. Candidates, not parties, dominate campaigns. Interest groups, especially PACs, raise enormous sums of money for congressional office-seekers and, in the view of the general public, exercise far too large a role in determining the actions of government.[24]

Citizens who view their interests as defined more broadly than the support of a given candidate or issue will find it difficult to pursue their objectives because of the restrictions on political parties. Voters are encouraged to put their energies into candidates, not parties, and to concentrate on

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[24] According to a CBS-New York Times poll taken after the 1994 elections, seventy-eight percent of voters believe Congress is more interested in serving special interests than the average citizen. Gil Klein, *Campaign Finance Report Still Waiting*, Tampa Trib., Aug. 19, 1995, at 4.

issues, not offices. Any effort to focus on the broad spectrum of issues is discouraged by the special interest view of politics enshrined in the Act.[25]

The FECA's limitations on party support encourage candidates to run campaigns with little concern for their party and its programs, and thus discourage responsibility and accountability. It gives an advantage to candidates with personal wealth, and promotes an endless search for contributions from special interest. It helps incumbents who have ready access to individual contributors and PACs, but limits the effective competition that is the foundation of voter control over government. It allows unlimited "independent" expenditures by groups with a narrow agenda, while restricting spending from the most broadly-based organizations, the political parties. It stimulates the worst political habits, the search for loopholes in the law such as "soft money," leading to further public cynicism about politicians and withdrawal from the electoral process. In short, the restriction of party contributions and expenditures has led to an *expansion* in the appearance of undue influence and corruption in our campaign finance system.

The law places political parties at a disadvantage vis-a-vis more narrowly based special-interest groups. The law permits non-party political committees to make unlimited independent expenditures supporting or opposing federal candidates. Political parties cannot make such unlimited expenditures. The FECA and the Commission's regulations

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[25] Stephen E. Gottlieb, *Fleshing Out the Right of Association: The Problem of the Contribution Limits of the Federal Election Campaign Act*, 49 Alb. L. Rev. 825, 832-48 (1985).

imprudently and unconstitutionally diminish the importance of political parties.

CONCLUSION

"Without parties there can be no organized and coherent politics. When politics lacks coherence, there can be no accountable democracy. Parties are indispensable to the realization of democracy. The stakes are no less than that. . . . Modern democracy is unthinkable save in terms of parties." These assertions represent the overwhelming consensus of those who study American politics.[26] Politics has become a regulated industry. If we understand the essential role of healthy parties in our political system, then, at the very least, one of the goals in the regulation of that industry should be preserving the vitality of our parties.

This Court should heed the advice of James Madison on the question of "factions" or "parties":

> There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence, the other, by giving to every citizen the same opinions, the same passions, and the same interests . . . . It could never be more truly said than on the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of

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[26] E.E. Schattschneider, *From Party Government* 1 (1940).

air, which is essential to animal life, because it imparts to fire its destructive agency.[27]

The essence of the First Amendment is the protection of liberty. The Act's limits on party activities restrict the liberty of political parties; the support of candidates is essential to a political party's life. Just as a fire without air will expire, so too will a political party prevented from freely supporting its candidates.

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[27] James Madison, *The Federalist*, No. 10, Nov. 23, 1787.

APPENDIX A

COMMITTEE FOR PARTY RENEWAL

Declaration of Principles

The Committee is a voluntary, bipartisan association of political scientists and practitioners committed to strengthening political parties in the United States. Organized in 1976, the Committee has sponsored panels on political parties at the annual meetings of the American Political Science Association and issued periodic statements on public policy questions pertaining to the American party system. In September 1977, the Committee presented the following declaration of principles, which was read by Professor James MacGregor Burns at the Jefferson Memorial.

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We meet today, at this shrine of American democracy, to deplore the disintegration of a basic American institution. Our political party system, first inspired by Thomas Jefferson, is in serious danger of destruction.

Without parties there can be no organized and coherent politics. When politics lacks coherence, there can be no accountable democracy. Parties are indispensable to the realization of democracy. The stakes are no less than that.

We are not speaking today in defense of the boss-ridden parties of an earlier era. Indeed, the demise of the boss has opened a new opportunity for a strong two-party system. Currently, in certain states, new-style parties have already taken shape, providing a model of broad participation, focused on issues.

But such local rebuilding is struggling against powerful counterforces that are undermining party structures everywhere. If these forces ultimately prevail, it would mean the end of potentially the most powerful political organizations acting for the people as a whole--poor people, middle class people, all those who lack specialized political organizations of their own. It would mean the end of a crucial link between the mass of people and the issue-discussing and policy-making process. It would mean the end of an organized "loyal opposition" that can keep officials under watch and on their toes. It would mean the end of any real hope for national party leadership with enough clout to hold Presidents to their campaign promises and curb tendencies toward the "imperial presidency."

What would take the place of parties? A politics of celebrities, of excessive media influence, of political fad-of-the-month clubs, of massive private financing by various "fatcats" of state and congressional campaigns, of gun-for-hire campaign managers, of heightened interest in "personalities" and lowered concern for policy, of manipulation and maneuver and management by self-chosen political elites.

To reverse the decline of party and reinvigorate these great instruments of democracy, we urge the following steps:

1. Public financing of campaigns through parties. Instead of giving money to individual candidates, the federal and state governments should provide funds to the parties, which would use it both to strengthen their organizational and educational programs and to help candidates with their campaign costs. Public funding of parties already exists successfully in a half-dozen states, and is a part of the presidential campaign finance law. These sound precedents should be taken as a model for any proposal to finance congressional campaigns.

2. Mid-term conventions for both major parties.
We urge that each party hold a mid-term national convention, where issues may be debated and voted upon, and the party's platform renewed. Delegates to the convention should include both elected office-holders and persons chosen by the party rank-and-file. Holding such a convention is at least as important for the party out of power as for the party in power.

3. Reverse the trend toward more and more primaries. Primaries, in an appropriate misture with other devices such as caucuses and state conventions, are part of the traditional process by which the major parties choose their nominees for President. But the system has gotten out of

balance. About three-quarters of the delegates to national conventions are now chosen in primaries. More states are planning to adopt presidential primaries, if only to share in the kind of media attention a small state like New Hampshire receives. Collectively these primaries are expensive, exhausting, confusing, and unrepresentative. In the interest of democracy and for the sake of the party system, we call upon state legislatures to reverse the trend toward proliferation.

These steps, taken together, will serve the important purpose of helping to broaden party participation, revitalize party activity, and hence strengthen democracy in wards, precincts, and communities throughout the country.

It is more than three years since Watergate. We are in danger of forgetting the main revelation of that episode: the pernicious influence that big-time campaign contributors can have over government. The best remedy for that disease is the revitalization of the party system. We call upon all friends of democracy to join us in working for party renewal.

APPENDIX B

COMMITTEE FOR PARTY RENEWAL

Principles of Strong Party Organization*

"A political party is the instrument of the people's will. It exists not just to win elections but to move a country. Its purpose is not to placate a cacophony of strident voices, but to attract diverse groups to a common purpose. It is built not on television, but on a national vision. And when that party is out of power, its charge is to provide an alternative."

Senator Ernest F. Hollings**

Political parties are an American invention. Jefferson and Madison devised them as means of changing the policy directions of government; Jackson and Van Buren revised them as means of expanding popular participation in government. Since the 1830s, they have, albeit imperfectly,

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* This position paper was prepared by Jerome Mileur, Executive Director of the Committee for Party Renewal, reviewed by the Committee's executive committee, submitted to the full membership for comment, and approved at the Committee's annual business meeting, September 1, 1984.

** The Washington Post (National Weekly Edition), July 23, 1984, p. 23.

continued to serve these ends. Parties are the only broad-based, multi-interested organizations we have that can nominate candidates for office, mobilize popular support behind them, and organize those elected into a government. Unlike special-interest groups, parties must appeal to pluralities in the electorate if they are to win; and unlike single-candidate organizations, they must win many races if they are to govern. Parties, moreover, give coherence to American politics. We have a constitutional system and a political culture dominated by disunifying forces: separated powers, federalism, pluralism, individualism. Parties have been a unifying force in this system, cutting across the branches and levels of government as well as across voting blocs to aggregate interests, build coalitions, and make mass democracy possible.

Political parties have always had a difficult time in our constitutional system and will always have to compete for influence here. Historically, their influence has waxed and waned. But strong parties and a strong party system remain the best hope for representative and responsible democracy in an extended and diverse republic like ours. They are the only institutions in our electoral system that can be held accountable for what government does. Those elected to public in their name must make policy, not just advocate it, and are answerable for their actions to the electorate as a whole, not to a narrow constituency of limited and special interest.

Strengthening our political parties ultimately means making them more representative and accountable institutions that link elections to government, so that voters can influence the direction of public policy. A strong party

system, therefore, should be both competitive and participatory, and should structure electoral choice as to the direction of government. A strong party should have the organization and resources to formulate a coherent set of public policy principles, to nominate and elect candidates for public office consistent with these principles, to withhold party support from candidates who do not support its principles, and to advance these principles in government. A strong party should be open to all party members, should have active committees at all levels, should support candidates for all public offices, should be professionally staffed, and should have clear lines of internal authority. We believe the following principles of strong party organization are a guide to these ends.

(1) Political parties should govern themselves. As private associations with public responsibilities, parties should be as free as possible from state and federal regulation to determine their own structure and functions. The public interest requires that parties operate in an open, honest, fair, and accountable way, but these goals may be achieved through reporting and disclosure requirements and not by detailed regulation of party organization and activities. Parties should define their organization and powers formally and publicly through party constitutions or charters and by-laws, so that all who affiliate with them may know the rules of party governance. In our political system, parties differ organizationally and functionally from political action committees and other special interest groups, and they should not be treated the same in law. Indeed, state and federal courts have regularly recognized this distinction. The public interest is best served by law that complements party self-regulation, not by statutes that substitute for it.

(2) Political parties should use caucuses and conventions to draft platforms and endorse candidates. Caucuses and conventions are avenues of general participation in party affairs that encourage dialogue and peer review of party programs and candidates. The quantity of participation in them may not be as large as in primaries, but the quality of participation is much higher. Local caucuses open to all registered party members are useful checks on both the programmatic direction of a party and the ambition of individuals seeking party endorsement for public office. Party conventions, representative of local caucuses and committees, should devise platforms and endorse candidates for public office. Party primaries closed to all but party registrants can be an effective rank-and-file check on party endorsements and should therefore follow party conventions.

(3) Political party organization should be open and broadly based at the local level. Local politics is a basic testing ground for candidates and the principal arena of direct citizen participation in politics. Strong local party committees should be the foundation upon which state and national party structures are built. They should be the principal party instrument for defining membership, registering voters, recruiting candidates, and conducting campaigns. They should also be central to the development of a party platform and to public education with respect to party programs for government.

(4) Political parties should advance a public agenda. Parties are the most broadly-based organizations in our democratic system and thus best able to define priorities for government and to develop programs that serve general

interests. They serve the public interest best by developing and defining a broad philosophy of governance that differentiates one party from another and by giving voters a reasonable choice in the direction of government. Parties should develop platforms at all levels of government through open and representative procedures that begin with caucuses at the local level in which all registered party members may participate. They should publicize their platforms in order both to inform their members and to educate the public, and should develop procedures through which to hold party nominees and office holders accountable to party platforms.

(5) Political parties should endorse candidates for public office. If parties are to present voters with a choice of policy alternatives and if they are to be accountable for governance, they must have a measure of control over who runs for office in their name. At the very least, parties should be able to establish threshold tests for candidate access to primary ballots of 15-20% of the vote at endorsing conventions, thereby assuring that all candidates for nomination represent significant factions within the party. Checks may be legislated on party endorsement processes to ensure full and fair participation of party members, but the ultimate check will and should be whether a party's program for and performance in government merit the support of the general electorate.

(6) Political parties should be effective campaign organizations. Parties will be strong insofar as candidates depend upon them for election and insofar as they are key to the success of those who seek election in their name. To this end, parties should recruit candidates who share their philosophy and should provide them with training and expert

advice and direction in the organization and conduct of their campaigns, with research on the district and the opponent, and with polling, media, and other state-of-the-art campaign services. Parties should also endeavor to coordinate campaigns of all party candidates in a given election to minimize conflicts and to maximize resources.

(7) Political parties should be a major financier of candidate campaigns. No service to candidates is more important than the provision of money, and there should be few restraints on the ability of parties to raise and spend money in campaigns. Limits on individual contributions to parties should be removed, and limits on annual individual contributions to parties that qualify for a full tax deduction or credit should be raised significantly. Statutory limits on group contributions to candidates and parties should be retained. Parties themselves should be able to make unlimited contributions to the campaigns of their candidates for offices at all levels of government. If a system of public financing of elections is adopted, it should use the parties as channels through which to distribute these funds as they see fit.

(8) Political parties should be the principal instruments of governance. Parties should be instruments of collegial governance which broaden and unite leadership in the different branches and levels of government and by means of which specific programs may be developed to implement party platforms. State central and national party committees should work closely with party leaders in the legislative and executive branches of government to advance the party platform. Party leaders in Congress and state legislatures should make maximum use of caucuses in setting a party

agenda and developing strategy. Presidents and governors should make maximum use of party platforms and committees to develop their programs and to educate voters. Equally important, the opposition party(s) should be institutionalized, through question periods or in other ways, so as to provide a more effective check on specific policy decisions of the government. Between elections, the opposition is the key to accountability, and the quality of democratic government turns as much on its performance as it does on that of the party in power.

(9) Political parties should maintain regular internal communications. Parties at all levels should keep members informed of activities, decisions, and plans through newsletters or other house organs. This is another avenue of accountability and also one of participation, for it facilitates an exchange of ideas, positions, and analyses about the party and politics of the moment. Organizationally, a good house organ can build support for party positions and programs and also lance sores before they become cancers. It also makes for "news" about the party.

(10) Election law should encourage strong political parties. More than other forms of political organization, parties have served egalitarian and majoritarian values and encouraged widespread citizen participation in American politics. They are our most democratic institutions and should be sustained and encouraged by public policy. This can be done in many ways, including requiring voter registration by party, adopting the party column ballot, and restoring partisan local elections. Public policy should also recognize the difference between parties and other political groups in the regulation of campaign finance, the making of

endorsements, and access to both the ballot and the news media. By law, parties should have a privileged position in our political system. They should be given advantages over special interest groups and over individual candidates.

In recent years, there have been widespread reports that our political parties are dying. These obituaries are premature. Indeed, party organization at the state and national levels may never have been healthier than it is today, as the number and professionalism of staff has grown along with the financial resources and activities of parties at these levels. Rather than on their deathbed, our parties have been in a long transitional period from an old politics of patronage and machine organization to a new politics of issues and high technology. Since the 1960s, both national parties have sought to renew themselves by adapting organizationally to the changed realities of American politics. The two parties, however, have not taken the same approach to renewal: the Democrats have concentrated on internal reform, while the Republicans have focused on candidate services. But a truly strong party should travel both these paths: it should be both internally democratic and electorally effective. We believe that the principles outlined above will produce the kind of party organization that can realize these goals and strengthen American democracy as a result.

APPENDIX C

COMMITTEE FOR PARTY RENEWAL

Statement On Campaign Finance

Legislation affecting campaign finance reform will soon be before you. The Committee for Party Renewal urges that you support those measures that increase the role of political parties in election campaigns. We endorse provisions in recent proposals which further this basic goal. They should be central in any new statute.

Political parties are the only broad-based, popular intermediary between the people and their government. Voters use the parties to steer the government in the direction they wish it to go. When the political parties are working, government works. When the political parties cannot supply the oil, the result is a clanking of the engines of government.

Today, many Americans are dissatisfied with their government. Recognizing the problem, the Congress is preparing to act on campaign finance reform. In its action, the Congress should focus on the truly basic causes. The public's disenchantment, we believe, stems from the fact that political parties no longer play a major role in Congressional elections. The decomposition of the parties is responsible for a new politics, characterized by excessive media influence, massive private financing by various "fat cats" of

state and congressional campaigns, gun-for-hire campaign managers, and lower public concern for policy.

Campaign finance reform can remedy these problems. It should further four vital goals: (1) Restoring the parties to their rightful place; (2) Encouraging competition between the two parties; (3) Encouraging more people to participate in politics; and (4) Educating the electorate. These goals can be incorporated into any pending legislation. They would enhance the standing of both the Democratic and Republican parties, without giving either any advantages in new legislation.

Money is the crucial ingredient in campaigns. While money itself is not an evil, the system of finance needs repair. In so doing, Congress has an opportunity to refurbish a vital institution of government -- the political parties. This can be accomplished in five ways. First, limits on individual contributions to parties should be substantially raised for such party-building purposes as voter registration, program development, research, and get-out-the-vote drives. Second, contributors to parties for campaigns should be allowed to give more than contributors to individual campaigns. Third, parties themselves should be able to make unlimited contributions to their candidates for offices at all levels of government. Fourth, any system of public financing should channel campaign funds through party committees. Fifth, there should be full disclosure of all contributions and expenditures.

New legislation must be fair to both parties. Their respective, and different, funding sources must be recognized

and each party must have an opportunity to state its case fairly and fully. This requires that any spending limitations be set at a sufficiently high level to allow true competition. It also requires that the parties, and their candidates, be encouraged to develop multiple sources of financial support, beyond political action committees. Restoration of individual tax credits for political contributions would serve these ends, and increase political participation, in the form of financial support of campaigns by the general public. Fair competition would also be promoted by legislation that reduces the cost of campaigning, including reduced broadcasting rates and postal rates or even free mailings.

Renewed political parties can again provide a forum for discussion of vital issues and make government more responsive to public opinion. With new technologies, action is needed to enable parties to act as opinion organizers. In its legislation, the Congress should mandate significant and free television time for the parties, on behalf of themselves and their candidates. As noted in the recent report to the Majority and Minority Leaders of the Senate, the United States is the only major democracy that does not provide for some free broadcasting time. The amount of television time should be sufficient so that parties can campaign effectively on behalf of their tickets, sponsor "generic" ads that convey party positions on important voting issues, and provide considerable time for individual candidates to reach the voters. The content of these messages should be left completely to the parties and candidates.

In addition to the free broadcast time, political parties should be the sole sponsors of televised debates. Indeed, the free

television time given to the Democratic and Republican parties should be conditioned on their acceptance of such sponsorship. Debates do more than simply inform voters of who the candidates are; they enhance the electorate's ability to make a considered judgment. Voters are not fools. When provided with information about the candidates' views, voters show an uncanny skill to cast an informed, responsible ballot.

These proposals are modest, but interrelated. The Congress should pass an integrated program now in order to avoid the consequences of piecemeal change, which often creates more new problems than it resolves. The proposals we recommend would restore political parties to their rightful place in government. Without parties there can be no organized and coherent politics. When politics lacks coherence, there can be no accountable democracy. Therefore, parties are indispensable to the realization of democracy, and financing is central to parties. The stakes are that high. Renewing the political parties would be a lasting achievement of the 101st Congress.

The Committee on Party Renewal consists of some 500 political scientists and party activists interested in revitalizing political parties in the United States. Since its inception in 1975, the Committee has sponsored workshops on party building and publishes a quarterly newsletter, *Party Line*.

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IN THE

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OCTOBER TERM, 1995

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Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND ACLU OF COLORADO AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit membership corporation with nearly 300,000 members throughout the United States. The ACLU of Colorado is one of its state-wide affiliates. For more than

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[1] Letters from counsel for each of the parties consenting to the filing of this *amicus* brief have been submitted to the Clerk of the Court.

75 years, the ACLU has been dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has been an active participant in litigation involving government regulation of campaign speech. The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the landmark challenge to the constitutionality of federal election laws. The ACLU also participated as *amicus curiae* in *California Medical Association* v. *FEC*, 453 U.S. 182 (1981); *Common Cause* v. *Schmitt*, 455 U.S. 129 (1982); *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Meyer* v. *Grant*, 486 U.S. 414 (1988); and *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). In addition, the ACLU has represented various groups and individuals, of all ideological persuasions, whose political advocacy has been prohibited, restricted or inhibited by campaign finance laws. *See, e.g., Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

STATEMENT OF THE CASE

From the early days of our Republic, political parties have spearheaded public debate about the statements and actions of elected officials. Following that tradition, the Colorado Republican Federal Campaign Committee (the "Colorado Republicans") in the spring of 1986 sponsored three radio advertisements criticizing statements by Democratic Congressman Tim Wirth. When the advertisements aired, Wirth already had indicated his intent to seek the Democratic Party's nomination for the open U.S. Senate seat from Colorado that would be filled in the general

election that November. As of their air dates, however, neither the Democrats nor the Colorado Republicans had nominated a candidate for the Colorado Senate seat.

One of the three advertisements sponsored by the Colorado Republicans, entitled "Wirth Facts #1," stated in full:

> "Paid for by the Colorado Republican State Central Committee
>
> "Here in Colorado we're use to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts." J.A. 161.

Consistent with the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-456 ("FECA"), the Colorado Republicans ensured that donated funds supporting the anti-Wirth advertising did not come from corporations or unions. They accepted contributions of no more than $5,000 per contributing individual. Moreover, in their filings with the Federal Election Commission ("FEC") under FECA, the Colorado Republicans publicly disclosed the identities of donors and listed the $15,000 cost of Wirth Facts #1 and other

anti-Wirth advertising as an expense for "Voter Information to Colorado Voters — Advertising."

On June 12, 1986, the Colorado Democratic Party ("Colorado Democrats") complained to the FEC, alleging that the Colorado Republicans' expenditures on anti-Wirth radio messages and pamphlets violated § 441a(d)(3) of FECA, which imposes dollar limits on expenditures a national or state party can make in connection with the general election campaign of candidates for Federal office.[2] Accepting the Colorado Democrats' position as it relates to Wirth Facts #1, the FEC subsequently sued the Colorado Republicans, contending that the spending on Wirth Facts #1, when aggregated with the Colorado Republicans' other spending, exceeded the limit imposed on party-committee spending by § 441a(d)(3).

The United States District Court for Colorado rejected the FEC's position. J.A. 17. Holding that political parties (unlike bank, corporate or union political action committees) are incapable of making "independent expenditures," *see FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 28-29 n.1 (1981) ("*DSCC*"), the district court found that the anti-Wirth publicity was a "coordinated expenditure." J.A. 22-23.[3] But, following this Court's interpretation of the phrase in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the court found that the Colorado Republicans' payments for Wirth Facts #1 were not payments "in connection with the general election campaign" because the radio spot did not "expressly advocate" the election or defeat of a candidate. J.A. 25-31.[4] Accordingly, the court held that the payments were not reportable under § 441a(d)(3).

[2] Section 441a(d)(3) limits expenditures by the national committee of a political party or a state committee of a political party (including any subordinate committee of a state committee) "in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party." The limitation, in the case of a candidate for election to the office of Senator, is the greater of (i) 2 cents times the voting age population of the state or (ii) $20,000. Section 441a(d)(3)'s two-cents-per-voting-age-population figure is adjusted each election cycle for inflation. 2 U.S.C. § 441a(c).

The United States Court of Appeals for the Tenth Circuit reversed. Even though the court acknowledged that Wirth Facts #1 did not constitute "express advocacy" under *Buckley* or *MCFL*, the panel ruled that the Colorado Republicans' spending for Wirth Facts #1 was reportable under § 441a(d)(3) as an expenditure "in connection with the general election campaign" because the radio spot "named both a clearly

[3] A "coordinated" expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley* v. *Valeo*, 424 U.S. 1, 47 n.53 (1976). Coordinated expenditures are considered "contributions." 2 U.S.C. § 441a(a)(7)(B)(i). An "independent" expenditure is one "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

The district court felt itself constrained by this Court's decision in *Buckley* and by the FEC's interpretation of FECA to hold the Colorado Republicans' expenditure to be "coordinated" because "[i]t was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated." J.A. 23.

[4] The Court has defined "express advocacy" to mean "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52; *accord MCFL*, 479 U.S. at 249.

identified candidate and contained an electioneering message." J.A. 44-45 & n.10.

The Court of Appeals did not confront the overbreadth and vagueness concerns that led this Court to construe other "in connection with" language in FECA to require "express advocacy." In a remarkable piece of circular reasoning, the court suggested that it considered such a narrow construction of § 441a(d)(3) not to be required by the First Amendment because political contributions are more susceptible to regulation than independent expenditures. J.A. 39-41, 43-44.

The Court of Appeals articulated what it apparently considers to be the test for an "electioneering message":

> "Any reasonable reading of 'Wirth Facts #1,' which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee. 'Wirth Facts #1' unquestionably contained an electioneering message." J.A. 45.

The Tenth Circuit dismissed the Republican Party's contention that it would violate the First Amendment to subject the spending for Wirth Facts #1 to the limit imposed by § 441a(d)(3). Noting that the "coordinated expenditures" permitted by § 441a(d)(3) are treated for purposes of reporting and monetary limitations as "contributions from the political committee to the candidate," the Court of Appeals held that "[t]he same reasoning" used by this Court to uphold other contribution limitations applies to the limits on "coordinated expenditures" by a political party. J.A. 47.

Applying that reasoning, the court upheld the political party spending limitation as "a permissible burden on speech and association." J.A. 46. The court held that § 441a(d)(3) serves (1) to protect against "domination" of party spending choices by incumbent officeholders who may hold a party's purse strings, J.A. 47, and (2) to preclude party committees from securing (or appearing to secure) a political *quid pro quo* from current or potential office holders, J.A. 48. The court also suggested that the expenditure limitation was justified under *Buckley* as a means of equalizing the relative ability of all citizens to affect the outcome of elections and as a means of capping campaign costs "to a degree" and thereby increasing accessibility to our political system. J.A. 48.

SUMMARY OF ARGUMENT

1. Section 441a(d)(3) impermissibly discriminates against parties. Political parties are the *only* political groups that do not enjoy the right to spend unlimited amounts on campaign-related speech. This is the result of a constitutionally indefensible Catch-22. On the one hand, party and candidate are deemed by operation of law to be so inextricably linked that party spending cannot be "independent" of the candidate, and thus free from spending limitations. On the other hand, party and candidate also are deemed to be sufficiently separate that party spending on a candidate's behalf can be treated as a "contribution" to the candidate, and thus subject to spending limitations. If, as we maintain, party and candidate are one and the same, parties should be free from the campaign spending limitations that apply to "contributions." If party and candidate are viewed as separate, however, parties should be allowed to make unlimited expenditures if those expenditures are not coordinated with the candidate.

2. Even if a party's expenditures on behalf of a candidate are viewed as "contributions" to the candidate, § 441a(d)(3) violates the First Amendment because it does not serve to prevent corruption or the appearance of corruption — the only governmental interests thus far identified as sufficiently compelling to justify restricting political organizations' campaign finances. A political party cannot "corrupt" its own candidates by spending to get them elected, even if the spending is controlled by the candidate. Such spending does not present any of the dangers that this Court has held may justify limitations on political spending. The other interests suggested as justifications for § 441a(d)(3) by the Tenth Circuit — equalizing the relative ability of all citizens to affect the outcome of elections and capping campaign costs — in fact have been rejected by this Court as justifications for spending limitations.

3. Even if some election-related speech by a political party might constitutionally be limited to prevent "undue" or "improper" influence, § 441a(d)(3), as construed by the Tenth Circuit, is both overbroad and impermissibly vague. It is overbroad because the standard announced by the Tenth Circuit in theory could encompass virtually all speech regarding a current or would-be officeholder. It is impermissibly vague because one simply cannot know in advance whether particular messages will be deemed to be "electioneering messages."

ARGUMENT

I. THE SPENDING LIMITATION IMPOSED BY 2 U.S.C. § 441a(d)(3) IMPERMISSIBLY DISCRIMINATES AGAINST POLITICAL PARTIES AS SPEAKERS.

It is axiomatic that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978) (citation omitted). Section 441a(d)(3) impermissibly discriminates against political parties as speakers, subjecting them to spending limits applicable to no other political group. Under any standard of review, this discrimination renders § 441a(d)(3) invalid under the First Amendment.[5/]

Political parties are the *only* political groups that do not enjoy the right to spend unlimited amounts on campaign-related speech. Other political groups are permitted to make unlimited "independent expenditures" in support of (or in opposition to) candidates. But because parties are deemed to

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5/ The distinction between political parties and other speakers drawn by § 441a(d)(3) is distinguishable from the distinction between cable programmers and broadcasters created by the must-carry rules addressed in *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445 (1994). In *Turner*, this Court declined to presume that the must-carry rules were invalid even though they distinguished between cable operators and broadcasters. *See id.* at 2460-61. Unlike the situation here, the must-carry rules discriminated against a *medium of speech*, because the distinction that the rules imposed was "based only upon the manner in which speakers transmit their messages to viewers." *Id.* at 2460. *Political parties themselves* are the targets of § 441a(d)(3), because the expenditure limitation burdens parties regardless of what medium of communication a party uses to express its support for its candidates.

be incapable of making "independent expenditures," their expenditures are automatically treated as "contributions" to the party's own candidates (whether or not its candidates have even been selected), and therefore as subject to contribution limitations.

The result is a First Amendment double-whammy. All party expenditures "in connection with" a general election campaign may be limited (not just expenditures that are in fact "coordinated" with a candidate), because all party expenditures are deemed to be "contributions" as a matter of law. And, because all party expenditures on a candidate's behalf are regulable as "contributions," the Tenth Circuit held that expenditures for party speech can be restricted (as expenditures "in connection with" a general election campaign) even if the speech does not expressly advocate the election or defeat of any candidate but merely contains an "electioneering message."

There is no justification for treating a political party as distinct from the candidates it fields for office, and for characterizing its spending on behalf of its candidates as the equivalent of "contributions." The party *is* the candidate, and *vice-versa*. Spending by a party on behalf of its candidates is the functional equivalent of an expenditure by the candidate and may no more be restricted than any other expenditures by the candidate.

In any event, the government's approach to party spending is both unfair and unjustifiable. The government cannot simultaneously treat party and candidate as so *indistinguishable* that party expenditures on behalf of the candidate cannot be considered independent of the candidate, and yet as sufficiently *distinct* that party expenditures on behalf of the candidate may be regulated as party contributions *to* the candidate.

If party and candidate are one and the same for campaign spending purposes, then all party expenditures *on behalf of* the candidate should be treated as expenditures *by* the candidate — and hence as subject to no limitation. *See Buckley*, 424 U.S. at 54-58. If, however, party and candidate are deemed sufficiently distinct that the party may make "contributions" to the candidate, then the party ought to be able to make unlimited expenditures if the expenditures in fact are not "coordinated" with the candidate. In either case, the party, like other political groups, ought to be able to make unlimited expenditures.

II. ANY LIMITATION ON WHAT A POLITICAL PARTY MAY SPEND ON CAMPAIGN-RELATED SPEECH VIOLATES THE FIRST AMENDMENT.

In *Buckley*, this Court recognized that FECA's contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14. The Court explained:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. * * * In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application

precisely to the conduct of campaigns for political office.'" 424 U.S. at 14-15.[6]

Because "the use of funds to support a political candidate is 'speech' * * * 'at the core of our electoral process and of the First Amendment freedoms,'" the government bears the burden of proving that § 441a(d)(3)'s spending limitation is necessary to serve a compelling governmental interest and is narrowly tailored to that interest. *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citation omitted); *Bellotti*, 435 U.S. at 786. That is a burden the government cannot meet.

A. Limiting party spending in connection with an election campaign does not serve to prevent corruption or the appearance of corruption.

The only interests that this Court has recognized as sufficiently compelling to justify limitations on a political organization's spending are the prevention of corruption and the prevention of the appearance of corruption. *See FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). These interests were deemed sufficient to justify the contribution limitations challenged on First Amendment grounds in *Buckley*, 424 U.S. at 26-38, but

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[6] The Court specifically cautioned that, "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21.

they are not sufficient to justify the spending limit imposed by § 441a(d)(3).[7]

In upholding § 441a(d)(3), the Tenth Circuit purported to rest on the government's interest in preventing the reality or appearance of corruption. But the forms of "corruption" that the court identified — "domination" of party spending choices by incumbent officeholders, J.A. 47, and "*quid pro quos*" between current or potential office holders and their own political parties, J.A. 48 — have little or nothing in common with this Court's understanding of the concept of "corruption." Indeed, the concept of "corruption" invoked by the Tenth Circuit to justify restrictions on campaign spending strikes at the heart of our political system.

It is central to our political system that a candidate loyally will carry forward and champion the program of the candidate's political party — regardless of how much or how little the party spends to promote the candidate's election. That is how the system is supposed to work. On the other hand, a candidate is not presumed to be loyal to individuals or private entities. The danger of corruption arises from the possibility that individuals or entities will try to "purchase" loyalty not otherwise due, or seek "special favors" or "private" rewards.

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[7] The Court held in *Buckley* that political contributions could be restricted to "limit the actuality and appearance of corruption," 424 U.S. at 26, but invalidated limitations on "independent" expenditures because such limitations do not serve that purpose, *see id.* at 45; *see also id.* at 59-60 n.67. The Court expressly reserved the question whether FECA's limits on "coordinated" expenditures by state party committees in 2 U.S.C. § 441a(d) (previously codified as 18 U.S.C. § 608(f)), violate the First Amendment. *See id.*

The concept of an illicit "*quid pro quo*" assumes a candidate and individuals or groups whose interests are separate and distinct from those of the candidate, and upon whom the candidate, once elected, can bestow a "private" benefit. The interests of a candidate and his or her political party are not separate and distinct; for campaign spending purposes, the candidate and the party are one and the same, and the benefits the candidate can confer on the party are not "private."

There is no justification for treating a political party as distinct from the candidates it fields for office, and thus for characterizing its spending on behalf of its candidates as the equivalent of "contributions." Intra-party conflicts notwithstanding, the premise of our political system is that a candidate and the party are one and the same. The party *is* the candidate, and *vice-versa*. Spending by a party on behalf of its candidates is the functional equivalent of an expenditure by the candidate and may no more be restricted than other expenditures by the candidate.

It is ludicrous to suggest that a party can "corrupt" the political process by supporting its own candidates (or opposing candidates of other parties). Party activity supporting or opposing candidates *is* the "political process." From antiquity to the present, parties always have existed to enable party members to provide political support for party candidates in concert with the candidates' efforts to advance the party's interests, goals, platform, and agenda. The exchange of "political favors" between political parties and their candidates is so well established that the Court has enforced it in the electoral college. *See Ray* v. *Blair*, 343 U.S. 214 (1952) (a party may require its candidates for the electoral college, as a *quid pro quo* for the party's nomination as an elector, to pledge to vote automatically for whatever presidential ticket the party ultimately nominates).

The relationship between a political party and its candidates legitimately includes party funding for political advertisements in exchange for both tacit and overt promises from the party candidate. There is nothing in such exchanges that gives rise either to real or apparent corruption of the political process. Citizens organize in political parties to pool money and labor so that they may spend money to support candidates who in turn, once elected, will fulfill their promises by working to advance the party's program through legislation or executive branch action.

The touchstone of corruption is not influence *per se* but "improper" or "undue" influence, *Buckley*, 424 U.S. at 27, 53 & n.59 (quotation omitted); *Bellotti*, 435 U.S. at 789; not the securing of commitments from a candidate but the securing of "improper" commitments, *Buckley*, 424 U.S. at 47, the use of money for "improper" purposes, *id.* at 67. As the Court stated in *NCPAC*,

> "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." 470 U.S. at 497.

There is nothing "improper," "undue" or subversive of the political process about party influence. It would be nonsensical to view a party's spending on behalf of its own candidates as a form of "improper" influence. To be sure, a successful candidate is likely to use her power as an elected official to implement her party's platform. But in our system, it is assumed that she will do so; she is supposed to do so;

there is nothing "corrupt" about her doing so. The Tenth Circuit's concept of illicit "*quid pro quos*" between current or potential office holders and their own political parties makes no sense. When this Court referred to "post-election special favors that may be given in return" for contributions, *Buckley*, 424 U.S. at 67, it surely was not referring to a candidate's adherence to her party's platform.

Similarly, this Court's reference to "the danger of candidate dependence on large contributions," *id.* at 55, must be understood as a recognition of the potentially subversive effect of large individual or other *private* contributions, not as a suggestion that support provided by the candidate's own party poses a threat to the political process. Indeed, the Court has affirmed the legitimacy of using party resources in support of party candidates to "encourage candidate loyalty and responsiveness to the party." *DSCC*, 454 U.S. at 42.

Thus it would have been normal for the citizens of Colorado who heard Wirth Facts #1 to expect that it would help the eventual Republican nominee for the Senate, just as it would be normal to assume that the eventual Republican nominee would be a loyal Republican. Passing judgment on that normal political process is a matter that the First Amendment entrusts *exclusively* to the citizens. The First Amendment protects a state political party's right to spend funds without limitation to support its own candidates and to attack those of opposing parties.

Equally invalid is the Tenth Circuit's concept of "corruption" arising from "domination" of party expenditures by incumbent officeholders. The Tenth Circuit did not explain precisely what type of "domination" it had in mind, but presumably it contemplated the possibility that an incumbent, by virtue of her power over party spending, might exert "improper" influence over party nominees or prospective

nominees, or perhaps use her power over party spending to ensure her own renomination and reelection. Again, however, there is simply nothing "improper," and hence nothing "corrupt," about an incumbent's influence over the party machinery. One may or may not approve of such incumbent influence, but preventing such influence is not (and could not legitimately be) an objective of FECA.

Would it be "corrupt" for Speaker Gingrich to use his influence within the Republican Party to stymie the fund-raising efforts of Republicans who have repudiated the Contract With America? Would it be "corrupt" for President Clinton to steer clear of fund-raisers for Democrats who refuse to toe the Democratic Party line on affirmative action or abortion rights? Incumbents, no less than party leaders, may legitimately steer party resources to those candidates who are in tune with the party's positions on the issues of the day. There is nothing "corrupt" about it.

B. The other governmental interests identified by the Tenth Circuit are insufficient to justify limitations on political spending.

The Court of Appeals mistakenly suggested that § 441a(d)(3) could be justified under *Buckley* as serving to "'equalize the relative ability of all citizens to affect the outcome of elections'" and to "cap campaign costs and increase accessibility to our political system." J.A. 48 (quoting *Buckley*, 424 U.S. at 26). To the contrary, the Court has held that such interests are not legitimate, much less compelling.

1. Equalizing the relative influence of speakers is not a legitimate governmental interest.

In *Buckley*, the Court considered and *rejected* the contention that FECA serves a "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Buckley*, 424 U.S. at 48. The Court firmly rejected any "equalizing" rationale for FECA:

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" 424 U.S. at 48-49 (citations omitted).

In *Bellotti*, 435 U.S. at 790-91, and *Meyer* v. *Grant*, 486 U.S. 414 (1988), the Court again rejected the contention that encroachments on freedom of political speech are justified by a desire "to mute the voices of those who can afford to pay." *Meyer*, 486 U.S. at 426 n.7.

Indeed, because it limits spending only by political parties, the challenged spending limitation actually *promotes* inequality. Other groups as well as individuals remain free to make unlimited expenditures, so long as the expenditures are "independent." It can hardly be considered "equalization" when other groups and individuals may turn up the volume as much as they desire, while the party's voice is muted.

"Equalization" cannot plausibly be advanced as a justification for a legal regime that seeks to "equalize" no one besides parties. *See Bellotti*, 435 U.S. at 793.

2. Restricting speech as a means of capping campaign costs is not a legitimate governmental interest.

The Tenth Circuit also suggested that § 441a(d)(3) serves a governmental interest in capping the costs of political campaigns. J.A. 48. But this Court similarly turned aside the notion that government may restrict political speech "to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns":

> "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people — individually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57.

Moreover, such cost-capping would have the perverse effect of driving contributions away from parties and toward political action committees, further eroding our party system. As a remedy for escalating campaign costs, this cure is surely worse than the disease.

In addition, because independent expenditures by others remain unlimited, the challenged spending limitation also does

not cap costs. Thus, even if the cost-capping justification for § 441a(d)(3) invoked by the Tenth Circuit were legitimate, § 441a(d)(3) would be fatally underinclusive in serving that interest. *See Bellotti*, 435 U.S. at 793.

C. The governmental interest held sufficient to prohibit the political use of corporate treasury funds does not apply here.

In *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), the Court, referring to a different type of "corruption in the political arena," upheld a state law that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, candidates in elections for state office. Under the state law at issue in *Austin*, corporations remained free to make such expenditures from segregated funds used solely for political purposes. *See id.* at 654-55.

The Court held that the challenged prohibition served to prevent "corruption in the political arena" resulting from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. Party spending obviously does not present any danger of this type of "corruption" because the party accumulates wealth from citizens who *do* support the party's political ideas. Parties must rely on the popularity of their political agenda — not on any economic advantages that the corporate form may provide for investors — in order to attract contributions.

III. THE TENTH CIRCUIT'S CONSTRUCTION OF § 441a(d)(3) RENDERS THE STATUTE OVERBROAD AND IMPERMISSIBLY VAGUE.

A. The Tenth Circuit's Standard Is Overbroad.

Political speech is the lifeblood of the democratic process and, as such, receives the highest level of protection afforded by the First Amendment. As this Court has held, statutes that burden the exercise of political speech must be "narrowly tailored to serve a compelling state interest." *Austin*, 494 U.S. at 657 (citations omitted).

According to the Tenth Circuit, FECA's limits on political party expenditures serve the compelling interest in protecting the political process against the reality or appearance of corruption. "FECA effectively precludes political committees from literally or in appearance, 'secur[ing] a political *quid pro quo* from current and potential office holders.'" J.A. 48 (citation omitted). Assuming, *arguendo*, that some campaign-related speech by political party committees might threaten actual or apparent corruption, the limitation upheld by the Tenth Circuit sweeps in speech that could not possibly threaten such harm and therefore is overbroad.

According to the Tenth Circuit, all political party advertising that involves a "clearly identified candidate" and contains an "electioneering message" constitutes advertising "in connection with" a political campaign subject to the § 441a(d)(3) expenditure limits. Under the Tenth Circuit's test, a party political advertisement contains an "electioneering message" if a reasonable listener or reader would come away with the impression that the advertisement sought to garner or diminish support for a candidate.

In the real world, this means that virtually all party political advertisements that mention a candidate or an incumbent will contain an "electioneering message." As the current debate over term limits amply demonstrates, almost every incumbent member of the House of Representatives and most members of the U.S. Senate must be considered candidates from the day they first run for office until the day they announce their retirement from politics. Moreover, it is widely understood that a major purpose of political parties is the nomination and election of candidates.

It follows that virtually all political advertisements financed by a party committee will have — or at least be perceived to have — the purpose of promoting the election of the party's candidates and opposing the election of candidates from other parties.[8/] Applying the Tenth Circuit's test, it is difficult to imagine how a "reasonable listener" could fail to perceive an electioneering message in *any* party-sponsored advertisement that refers to a clearly identified candidate or potential candidate and discloses the name of the sponsoring party.[9/]

[8/] The Tenth Circuit's definition of an "electioneering message" includes messages that do not urge the reader to *vote* for or against a candidate but merely urge the reader to give or withhold *support* to the candidate. Thus, even if an advertisement somehow did not suggest that its readers should vote for a certain candidate, any suggestion that the reader should otherwise support that candidate — through contributions or volunteering, for example — could bring the advertisement within the Tenth Circuit's definition of an "electioneering message."

[9/] Indeed, the Tenth Circuit specifically identified as evidence of an electioneering message in Wirth Facts #1 the fact that the radio spot "included the notation of Republican Party sponsorship." J.A. 45. Wirth Facts #1 did not urge listeners to withhold election support for Wirth. All it said was that Wirth "doesn't have a right to change the facts." It could

(continued...)

As the Colorado Republicans have pointed out, many officeholders become candidates for reelection the day they take office, long before either party has even held a primary. Thus, under the Tenth Circuit's test, assuming that it was known or expected that the incumbent would seek reelection, § 441a(d)(3) would restrict the freedom of political parties to air such statements as "Colorado Republicans salute Congressman Joe Smith for his record of protecting Colorado's elk," "Colorado Democrats applaud Congresswoman Jane Doe's efforts in defense of abortion rights," "Colorado Republicans salute Congressman Doe for his vote to keep smut off the Internet."

The assertion that such a sweeping burden on political speech is "narrowly tailored" to any state interest, compelling or otherwise, is without merit. Moreover, no one could seriously contend that such purely political statements present the reality or appearance of a *quid pro quo* with a current or potential office holder. Consequently, the Tenth Circuit's standard for identifying speech uttered "in connection with" a political campaign is fatally overbroad.

B. The Tenth Circuit's Standard Is Impermissibly Vague.

Under this Court's precedents, the government must provide clear notice and guidance to participants in the political process when it seeks to regulate their First Amendment freedoms. As the Court has held:

[9/](...continued)
be viewed as calling upon Wirth to stop distorting the facts just as easily as it could be viewed as calling upon voters not to support him if he became the nominee.

> "[V]ague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to "steer far wider of the unlawful zone" * * * than if the boundaries of the forbidden areas were clearly marked.'" *Buckley*, 424 U.S. at 41, n.48 (citations omitted).

See also Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

The Tenth Circuit's test for what constitutes an "electioneering message" renders § 441a(d)(3) impermissibly vague. By its terms, the test sweeps in almost every political statement by a party committee that mentions a candidate or an incumbent. It leaves the FEC and the courts the discretion to decide on a case-by-case basis what expression will fall outside the § 441a(d)(3) expenditure limits. Parties who wish simply to comply with the law receive no guidance, let alone the "fair warning" required by *Buckley*. To avoid breaking the law, political parties inevitably will "steer far wider of the unlawful zone" than they would have if the Tenth Circuit had adopted a clear standard.

The vagueness of § 441a(d)(3) as interpreted by the Tenth Circuit ensures its arbitrary enforcement. As discussed, according to the Tenth Circuit's own words, the § 441a(d)(3) expenditure limits would apply to virtually every party-sponsored political advertisement that mentions a candidate or an incumbent. As the facts in this case amply demonstrate, however, the FEC will not consistently apply § 441a(d)(3) in such a manner. In the spring of 1986, the Colorado Republicans aired three advertisements (including Wirth Facts #1) and published two pamphlets — all of which clearly

identified Congressman Wirth and criticized his honesty and his political positions. The Commission proceeded only against Wirth Facts #1 and, without further explanation, declined to proceed against the other anti-Wirth materials.

Under the Tenth Circuit's test for an electioneering message, any reasonable reader or listener could have concluded that all of these political advertisements were intended to diminish support for Congressman Wirth. Yet the Colorado Republicans would have needed a dowsing rod or a crystal ball to determine in the spring of 1986 which political advertisements would eventually be deemed subject to the expenditure limits in § 441a(d)(3). Consequently, under *Buckley*, § 441a(d)(3) — as interpreted by the Tenth Circuit — is unconstitutionally vague.

CONCLUSION

For the foregoing reasons, § 441a(d)(3) violates the First Amendment. The judgment should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Petitioners,
v.
FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE ON BEHALF OF DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE AND DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI

The Democratic National Committee ("DNC") is the national political organization of the Democratic Party, and is the "national committee" of the Democratic Party within the meaning of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). 2 U.S.C. §431(14). The DNC is thus directly subject to the limitations imposed by the provision of FECA at issue in this case, 2 U.S.C. § 441a(d), with respect to expenditures

"in connection with the general election campaign[s]" of the Democratic Party's nominees for President of the United States and for the United States Senate and United States House of Representatives.

The Democratic Congressional Campaign Committee ("DCCC") is the political organization for Democratic Members of the House of Representatives and is defined by Federal Election Commission ("FEC") regulations, 11 C.F.R. § 110.1(c)(2), as one of the "political committees established and maintained by a national political party" within the meaning of FECA, 2 U.S.C. § 441a(a)(1)(B). The DCCC is responsible for assisting Democratic candidates running for election to the House. By virtue of delegations of expenditure authority by the national and state Democratic Party committees, the DCCC is directly subject to limitations imposed by section 441a(d) with respect to any expenditures it wishes to make "in connection with the general election campaign[s]" of Democratic candidates for the United States House of Representatives.

The Democratic Senatorial Campaign Committee ("DSCC") is the political organization for Democratic Members of the United States Senate and is also defined by FEC regulations, 11 C.F.R. § 110.1(c)(2), as one of the "political committees established and maintained by a national political party" within the meaning of FECA, 2 U.S.C. § 441a(a)(1)(B). The DSCC is responsible for assisting Democratic candidates running for election to the Senate. By virtue of delegations of expenditure authority by the national and state Democratic Party committees, the DSCC is directly subject to limitations imposed by section 441a(d) with respect to any expenditures it wishes to make "in connection with the general election campaign[s]" of Democratic candidates for the United States Senate.

Amici have a vital interest in the questions of whether section 441a(d) is constitutional and, if it is constitutional, in the standards that will be used by the FEC to determine when the limits imposed by that section apply to expenditures by party committees. Resolution of these questions will directly affect the amount of money *amici* can spend on their basic functions, including generating support for the Democratic Party and its principles, registering and turning out Democratic voters, and supporting particular candidates who are the nominees of the Democratic Party for federal office.

Pursuant to Sup. Ct. R. 37, written consent of all of the parties to the filing of this brief has been lodged with the Clerk.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the brief of the petitioners.

SUMMARY OF ARGUMENT

1. The FEC's construction of section 441a(d) of the Act is unconstitutionally vague. The FEC's construction of section 441a(d) as applying to all communications that contain an "electioneering message" leaves parties without any meaningful guidance as to what the law requires. Therefore, such a construction violates the guarantee of due process that is contained in the Fifth Amendment to the United States Constitution.

2. In order to avoid this constitutional infirmity, the court of appeals should have construed section 441a(d) to apply to political party communications only when they expressly advocate the election or defeat of a clearly identified candidate. This Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976), held that a limit on independent expenditures of individuals and groups must be so construed because it might otherwise be so vague and overbroad as to chill constitutionally protected expression not sufficiently related to the purpose of the statute.

Political parties undertake a wide range of communications, many of which, such as promoting policies and advancing positions on legislation, are akin to the sort of expenditures that this Court in *Buckley* held are entitled to a high degree of constitutional protection. The court of appeals proceeded on the premise that all such communications can nevertheless be treated as mere contributions to candidates, thereby implicating the statutory purpose of preventing real or apparent undue influence, by contributors to parties, on candidates who become officeholders. That premise was based on the FEC's presumption that parties cannot engage in truly "independent" expenditures because of the party's close relationship with its own candidates.

It is true that parties have a unique right and need to coordinate with their candidates, including party leaders and officeholders. Notwithstanding such coordination, many party communications do not implicate the relevant statutory purpose because they promote the party's ideas, positions or legislation, or urge support for the party generally, in a way that promotes public policy debate or benefits the party as a whole, rather than any particular candidate, and thus attenuates or eliminates any risk of "undue influence."

Section 441a(d) must be construed so as to avoid inhibiting constitutionally protected party communications that do not bear a sufficiently close relationship to the statutory purpose. It was to resolve precisely this type of overbreadth that the Court applied the "express advocacy" standard in *Buckley* with respect to independent expenditures. Application of that standard is equally necessary to save section 441a(d) from invalidity on grounds of overbreadth and vagueness.

3. Because the court of appeals applied the FEC's constitutionally impermissible construction of section 441a (d), the facial constitutionality of the section is not properly presented. In *dictum*, the court of appeals suggested

that the advertisement at issue in this case was not "express advocacy." Since that same conclusion might be reached on remand, it is not necessary for this Court to determine the facial constitutionality of section 441a(d).

ARGUMENT

I. THE FEC'S CONSTRUCTION OF 2 U.S.C. § 441a(d) IS UNCONSTITUTIONALLY VAGUE

While eschewing an "express advocacy" standard, the FEC seeks enforcement against petitioners on the basis of a test completely lacking in the specificity necessary to practically apply the Act's party spending limitations. The FEC claims, and the court of appeals concurred, that party communications are subject to the limitations of section 441a(d) if they are found (1) to have been made "in connection with the general election;" (2) to refer to a clearly identified candidate in the general election; and (3) to contain an "electioneering message." Pet. App. at 67a.

This Court has long held that "[t]he maintenance of the opportunity for free political discussion to the end that Government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Baggett v. Bullitt*, 377 U.S. 360, 372 n.10 (1964) (citations omitted). Because the right to free political expression is at the core of the First Amendment, "[a] statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the [Fifth] Amendment." *Id.*

The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the Government from enacting statutes that forbid the "doing of an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). This Court has held on numerous occasions that the prohibition against unconstitutionally vague statutes and regulations has particularly strong application in the area of First Amendment speech. *See, e.g., Baggett,* 377 U.S. at 372. Thus, in *Buckley,* the Court counseled the government that it may regulate political activities "only with narrow specificity." 424 U.S. at 41 n.48.

Despite the requirements imposed by the First and Fifth Amendments, the FEC advocates a standard—"electioneering message"—that leaves political parties without any meaningful guidance by which they may distinguish activities limited by section 441a(d) from those that are beyond its scope. Under that test, "electioneering message" is defined vaguely as a message that is "designed to urge the public to elect a certain candidate or party." Pet. App. at 70a. By its own terms, this test requires a subjective determination regarding what a political party "designed" its activities to accomplish. The result is a test that leaves political parties at the mercy of *ad hoc* Government determinations regarding which messages are "electioneering" in nature.

The subjective and vague nature of this test is clearly demonstrated by the facts of this case. The FEC based its conclusion that the advertisement in question contained an "electioneering message" on highly uncertain grounds. In order to determine whether the advertisement contained an "electioneering message," the FEC examined its placement and text, as well as the alleged motives of the party in producing and running the advertisement. Pet. App. at 69a-70a. With regard to this latter examination, the FEC, without any ability to know the party's "true motives" for running the advertisement, turned, among other things, to "news accounts" to determine why the party most likely ran this particular advertisement. *Id.*

It is precisely this type of subjective, case-by-case determination that the Due Process Clause and the First Amendment were designed to prohibit. To achieve the purposes of the Act, the FEC need not turn itself into a Delphic oracle, dispensing vague advice while at the same time ensnarling the unwary in the unforeseeable consequences of its riddled pronouncements. Indeed, in *Buckley,* this Court provided the FEC with a perfectly acceptable alternative to the vague "electioneering message" standard. The "express advocacy" standard, unlike the one proposed by the FEC, avoids constitutional infirmity. *See* Section II, *infra.*

The FEC's response to the acknowledged vagaries of the "electioneering message" standard demonstrates precisely how unsatisfactory that standard is. While noting that this standard "may leave room for uncertainty at the periphery," the FEC offers political parties the opportunity to seek an FEC advisory opinion, pursuant to 2 U.S.C. § 437f, in advance of any proposed activity that *might* constitute an "electioneering message." Br. for Resp't in Opp'n at 17. However, this proposed solution merely demonstrates the problem.

The purpose of the First Amendment, and indeed its value, is that it guarantees the right to freedom of speech without having to subject that speech to prior review and approval by the Government. Statutes that limit this right "must be narrowly drawn to meet the precise evil the legislature seeks to curb . . . and . . . the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *Baggett,* 377 U.S. at 372 n.10 (citations omitted).

In this instance, the FEC has proposed a standard that falls far short of this requirement. The "electioneering message" standard it has proposed would create uncertainty and apprehension among the political parties. With-

out the ability to *know* the lawfulness of their conduct, parties will be at the mercy of the government in delivering their political messages. This is precisely what the First and Fifth Amendments seek to avoid, and such a result is avoidable through the application of the clearer express advocacy standard.[1]

II. SECTION 441a(d) SHOULD BE CONSTRUED TO APPLY TO PARTY COMMUNICATIONS ONLY WHEN THEY EXPRESSLY ADVOCATE THE ELECTION OR DEFEAT OF A CLEARLY IDENTIFIED CANDIDATE

In *Buckley*, this Court found that, while contribution limitations impose only a "marginal restriction upon the contributor's ability to engage in free communication," 424 U.S. at 20-21, limits on expenditures "represent substantial . . . restraints on the quantity and diversity of political speech." *Id.* at 19. This Court found that the Government's interest in preventing the reality or appearance of corruption by the influence of campaign contributions on candidates' actions is "sufficient to justify the limited effect" of contributions on First Amendment freedoms. *Id.* at 29. The Court then proceeded to analyze FECA's limitation on independent expenditures by individuals and groups "relative to a clearly identified candidate."[2]

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[1] The court of apeals held that the FEC's interpretation of the FECA in establishing the electioneering message standard is entitled to judicial deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). However, such deference is not appropriate where, as here, the agency's interpretation of an act creates a "serious constitutional concern." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988); *see also Gates & Fox Co. v. Occupational Safety & Health Resources Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) ("the due process clause prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires").

[2] Contained in former section 608(e)(1).

First, this Court found that "in order to preserve the provision against invalidation on vagueness grounds," this provision "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Only then did the Court address the question of whether, "even as thus narrowly and explicitly construed," the limitation "impermissibly burdens the constitutional right of free expression." *Id.* The Court found that the "absence of prearrangement and coordination" of independent expenditures "undermines the value to the candidate," thereby "allev[iating] the danger" of corruption. *Id.* at 47. Therefore, the Government interest in preventing corruption does not justify the more substantial restraint on free expression imposed by limits on independent expenditures. *Id.*

In the instant case, the court of appeals reasoned that such a narrow construction is not required with respect to section 441a(d), because *Buckley* was interpreting a limit on independent expenditures, while section 441a(d) addresses "coordinated expenditures" that are to be treated as mere "contributions." Pet. App. at 12a-13a. The court assumed that, because parties are deemed incapable of making "independent" expenditures under the FEC's rules, *all* party expenditures are to be "treat[ed] . . . as contributions." *Id.* at 13a. Then, proceeding on the same assumption—*i.e.* "[v]iewing the party expenditures *as contributions*, as we must,"—the court found the FEC's broad construction of the statute to be reasonable, on the ground that, as mere "contributions," party expenditures implicate the statutory "concern that large contributors to political parties will exert undue influence on a candidate if elected to office." *Id.* at 16a (emphasis added).

Political parties engage in a wide range of communications. Party spending for some of these communications is akin to a contribution for purposes of the *Buckley* analysis. However, many party communications represent the

party's own political expression and are clearly entitled to the higher degree of constitutional protection *Buckley* afforded to expenditures. Further, many party communications simply promote the party or its ideas, positions or message broadly, rendering any link to specific candidates too diffuse to present even the perceived threat of undue influence. Therefore, section 441a(d) must be narrowly construed to avoid impinging on those party expressions that are entitled to a high degree of First Amendment protection but which do not fall into the area of speech intended to be regulated.

This Court supplied a properly narrow construction in *Buckley*, through application of the "express advocacy" standard. 424 U.S. at 44. This narrowing construction, intended to distinguish between issue discussion and electoral advocacy, is equally effective in distinguishing between party communications that are sufficiently linked to a particular candidate to be treated as mere contributions to the candidate, and expresions that more broadly promote the party, its themes, ideas or positions, and therefore are protected expenditures that do not implicate the statutory purpose.

A. Many Party Communications Should Be Entitled to the High Degree of Constitutional Protection Accorded to Expenditures

Political parties expend their funds on a wide array of communications. These range from communications that can clearly be considered, for purposes of this Court's analysis in *Buckley*, to be akin to contributions to those which, under that analysis, should be accorded the same high degree of protection as expenditures. At one end of the continuum, political parties may pay for communications that are contracted for or directly requested by a specific candidate, and unambiguously call for the election of that candidate to a particular office. These expenditures are clearly like contributions, in that they do not implicate the party's own expression, and thus "do not in any way

infringe the [party's] freedom to discuss candidates and issues;" rather, they "involve[] speech by someone other than the contributor." *Buckley*, 424 U.S. at 21. This sort of party spending is properly regarded as a kind of " 'speech by proxy' that . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *California Medical Ass'n v. FEC*, 453 U.S. 182, 196 (1981).

At the other end of the continuum lies a variety of communications that formulate and promote the party's ideas, programs and themes. Parties develop policy ideas and positions, not only in the adoption of their formal platforms, but on an ongoing basis. Both the DNC and the Republican National Committee ("RNC"), for example, have sponsored a number of policy councils and other policy development projects. *Cf.* David E. Price, *Bringing Back the Parties* 263-79 (1984). Parties are also involved in promoting their policies and positions by urging support for, or opposition to, legislation. The RNC, for example, recently requested guidance from the FEC with respect to a planned program of advertising concerning legislative proposals such as the balanced budget debate and welfare reform that are being considered by the Congress. FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 (1995). The DNC and some Democratic state parties have recently run advertisements on the balanced budget debate, and the DNC has in the past undertaken other advertising campaigns to promote legislative proposals or positions. *See generally* Herbert E. Alexander & Anthony Corrado, *Financing the 1992 Election* 295-96 (1995). Similarly, both Democratic and Republican committees publish bulletins, brochures and other communications that promote their respective parties' positions on legislative and other public policy issues (e.g., the DNC's "Daily Briefing" and the RNC's weekly "Monday Briefing"). In the same vein, the RNC sponsors a television program, "Rising Tide," in which party officials and leaders discuss such issues and promote

Republican views and positions. *See* Stephen Seplow, *GOP-TV: Plugged in to party line*, Philadelphia Inquirer, Oct. 31 1995 at A1.

These activities cannot be categorized or distinguished on the basis of whether they contain a reference to a "clearly identified" candidate. Often these party communications on issues refer to the positions or views of legislative leaders who may be candidates for re-election. For example, party discussions of legislative and policy issues may criticize the leaders of the opposing party for their views on, or actions with respect to, such issues. It is not unusual, for example, for Republican party materials to criticize the positions taken by the President on legislative issues and for Democratic party materials to criticize similarly the positions of Republican leaders in the Congress.

Other important party activities include efforts to persuade the public to support the party as a whole, without reference to a particular candidate. Such efforts include voter registration, programs to identify party supporters, leafleting, phoning and other activities aimed at turning out supporters on election day. Some communications may urge the public to "vote Republican" or "vote Democratic" without mentioning a specific candidate. The FEC's regulations recognize this category of activity as "generic voter drives," which are defined to include—

> voter registration, voter identification and get-out-the-vote drives, or any other activities that urge the public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

11 C.F.R. § 106.5(a)(2)(iv).

This entire range of communications is clearly entitled to the same degree of protection that the Court in *Buckley* accorded to expenditures, because limiting the amount parties can spend for such communications would "impose substantial restraints on the quantity of political speech."

424 U.S. at 39. In formulating and promoting policy positions, and supporting or opposing legislation, the parties are engaged in expressions "at the core of the First Amendment." *FEC v. National Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 493 (1985). This is all the more significant because "a major purpose of the Amendment was to protect the free discussion of governmental affairs. . . ." *Buckley*, 424 U.S. at 14 (citations omitted). Further, such expressions as well as "generic" communications promoting party themes cannot be considered mere "proxy speech." *California Medical Ass'n*, 453 U.S. at 196. Rather, they are expressions by the party itself, reflecting the party's collective judgment about what to say and when and how to say it. In this sense they do "communicate the underlying basis for the support" of the party and its candidates and thus directly implicate the party's "freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21.

Finally, these communications also directly implicate the parties' associational rights. "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by . . . freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This "freedom of association protected by the First . . . Amendment[] includes partisan political organization." *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986). In addressing legislative and policy issues, and promoting the party and its themes and principles, the parties function as "organizations which serve to 'amplif[y] the voice of their adherents.'" *NCPAC*, 470 U.S. at 494 (citing *Buckley*, 424 U.S. at 22).

Thus, while some party communications can logically be treated as contributions, many others must be considered akin to expenditures, entitled to the same high degree of constitutional protection as the expenditures of individuals and groups considered in *Buckley*.

B. Many Party Communications Do Not Implicate the Purpose of the Statute Notwithstanding Some Degree of Coordination with Candidates

The court of appeals did not consider whether section 441a(d) might impermissibly reach constitutionally protected communications that do not implicate the purpose of the statute. Instead, the court simply assumed—without analyzing the issue—that all party communications automatically bear a sufficiently close relationship to the purpose behind the statute. The court reasoned that since parties are deemed incapable of making independent expenditures under the FEC's rules, 11 C.F.R. § 110.7 (a)(5), *all* of their expenditures should be considered "coordinated" expenditures subject to section 441a(d). Pet. App. 13a. Similarly the FEC argues that, "because of a party committee's close relationship with the party's candidates, all expenditures by such a committee must be considered coordinated" and therefore treated as contributions. Br. for the Resp't in Opp'n at 9. The court and the FEC err.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97. As the court of appeals correctly recognized, section 441a(d) "addresses the concern that large contributors to political parties exert undue influence on a candidate if elected to office." Pet. App. at 16a; *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981). In *Buckley*, this Court held that "[t]he absence of prearrangement and coordination . . . with a candidate," 424 U.S. at 47, in an independent expenditure alleviates the danger of corruption.

To be sure, it is reasonable to assume, as do the FEC's regulations, that parties cannot make "independent" expenditures in the same way as other kinds of organizations. That is self-evident from the fact that parties

have a unique need to communicate and coordinate with their candidates. Such communications are with candidates not only in their capacities as persons seeking election to office, but also in their roles as party officials, leaders and spokespersons. Sponsoring a television show promoting the party's position on issues, for example, may naturally feature party leaders who are officeholders—and candidates—as spokespersons for the party. Brochures, leaflets and other materials promoting the party's platform or positions on legislative or policy issues may require obtaining information and views from legislators who may also be candidates. "Generic voter drive" activity may appropriately involve consultation with party leaders, who are officeholders and/or candidates, about which constituencies should be given priority in voter registration efforts, or what themes should be featured in materials or advertising urging the public to "vote Democrat" or "vote Republican."[8]

Parties have not only an inherent need, but also a unique associational right, to communicate and coordinate with their candidates. Limiting the ability of parties to communicate with their own leaders, including candidates, burdens the right of the party to "identify the people who constitute the association." *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). If the right of a party to select its "standardbearers," free from interference by the state, is a protected form of freedom of association, *see Eu v. San Francisco County Democratic Central Comm.*, 489

[8] Indeed, all of a party's activities may necessarily be coordinated with a candidate where officeholders who are or may be candidates actually serve as party officials, with broad responsibility for determining the party's priorities, message and programs. For example, the chairs of the congressional and senatorial campaign committees, Republican and Democrat, are Members of the House of Representatives and Senate, respectively, and national party committees may be led by officeholders as well. Senator Christopher J. Dodd currently serves as general chairman of the DNC and then-Senator Paul Laxalt formerly served as general chairman of the RNC.

U.S. 214, 224 (1989), parties must be free to work with and communicate with those candidates.

It does not follow, from the parties' unique need and right to coordinate with candidates, that all party communications implicate the statutory purpose of preventing contributors from exerting undue influence. Party communications promoting positions on legislation and issues, as well as generic communications urging support for the party and promoting its principles and themes, may as noted above, be coordinated with one or more candidates and may refer to or use as spokespersons the party's own leaders or criticize opposition figures (thereby referring to a "clearly identified" candidate). Yet such expressions inherently benefit the party as a whole; their benefit is not limited to any one particular candidate. The supposed threat of "undue influence" over a candidate effectively disappears, because the potential link between any one contribution to the party and the benefit to any one candidate becomes attenuated or dissolves altogether. These kinds of communications, therefore—while entitled to the highest degree of constitutional protection—do not trigger the congressional concern underlying section 441a(d).

C. Limiting the Scope of Section 441a(d) to Express Advocacy Is Necessary to Avoid Invalidation As Unconstitutionally Vague

Party committees cannot, under the First Amendment, be required to guess at what point along the broad continuum the limits of section 441a(d) will apply. "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963). "Where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked.' " *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (notes and

citations omitted). In this case, unless section 441a(d) is narrowly construed, party committees will be forced to steer wide even of those activities that are constitutionally protected and do not fall within the area sought to be regulated.

This problem of vagueness is precisely the one addressed by this Court in the first stage of its analysis of expenditure limits on groups and individuals in *Buckley*. The Court held that such a limitation "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. In adopting that construction, the Court was concerned that the limitation might otherwise inhibit discussions of issues and candidates that are constitutionally protected but do not fall squarely into the area of congressional concern:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially, incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.

Id. at 42. The Court thus sought to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

To be sure, the situation of political parties is different from that of other groups since all of a party's activities are, in a sense, political in nature. In *Buckley*, this Court found that it was not necessary to apply FECA's disclosure requirements only to party committee expenditures "expressly advocating" election or defeat of a candidate, since all party expenditures were intended to be subject to disclosure—and could, therefore, "be assumed to fall within the core area sought to be addressed by Congress: They are, by definition, campaign related." 424 U.S. at 79.

But disclosure requirements present a far less significant burden on parties than do limits on expenditures. "Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities." *Id.* at 64. While all party expenditures are subject to disclosure under the FECA and the FEC's rules, this Court has never suggested that section 441a(d) could be applied to limit *all* party communications.

To the extent that party communications involving substantial First Amendment rights do not implicate the relevant statutory purpose, they are indeed equivalent, as a matter of constitutional analysis, to "independent" expenditures by other kinds of organizations. Accordingly, to avoid the same problem of vagueness and overbreadth as the Court found to be presented by the individual and group expenditure limit in *Buckley*, section 441a(d) must be construed to apply only to those party communications that "expressly advocate" the election or defeat of a clearly identified candidate. *Id.* at 44. Just as the "express advocacy" standard was found necessary to ensure that the limit on individual and group spending would not inhibit issue discussion by such individuals and groups, so too would that standard serve to ensure that the limit on party spending does not, in the first instance, infringe on those analogous areas of party expression that are subject to a high degree of constitutional protection and do not fall into the "core area sought to be addressed by Congress." *Id.* at 79.

The "express advocacy" standard effectively limits the application of section 441a(d) to those instances where party spending is directly and "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. It would encompass those instances of party "proxy speech," *i.e.*, merely providing funds as a candidate directs unambiguously to promote that candidate's election to office, that can legitimately be treated for constitutional

purposes as mere contributions to the candidate. At the same time, it would eliminate the risk that parties would be inhibited from engaging in those activities which represent their own, protected expression—discussion of issues, policies, legislation, promoting the party as a whole—and in which the governmental interest in avoiding "undue influence" over any particular candidate is highly attenuated or non-existent because the benefit of the activity is widespread and diffuse, and not sufficiently linked to any particular candidate.

Section 441a(d) clearly cannot be constitutionally applied to *all* party communications. As a threshold matter, to avoid invalidation on grounds of overbreadth and vagueness, its scope should be limited to those party communications that "expressly advocate" the election or defeat of a clearly identified candidate.

III. THE COURT SHOULD NOT DECIDE WHETHER SECTION 441a(d) LIMITS ARE CONSTITUTIONAL BECAUSE THE CASE CAN BE RESOLVED WITHOUT DOING SO

This Court should reverse the decision of the court of appeals for the reasons discussed *supra; i.e.*, because the FEC and the court of appeals applied an unconstitutionally vague and improper legal standard to petitioners' coordinated expenditures in this case. However, in so doing, this Court need not rule on the facial constitutionality of the coordinated expenditure limits contained in section 441a(d). It is well-settled that a court should not "decide constitutional challenges in cases where the resolution of the unsettled questions of statutory interpretation may remove the need for constitutional adjudication." *California Medical Ass'n*, 453 U.S. at 193 n.14 (1981); *accord Thorpe v. Housing Auth.*, 393 U.S. 268, 284 (1969). Similarly, this Court has stated "it is wiser to delay passing upon the constitutionality of . . . [a] statute until faced with cases involving particular provi-

sions as specifically applied to persons who claim to be injured." *Nixon v. Administrator of General Services*, 433 U.S. 425, 438 (1977) (citations omitted).

In this case, the court of appeals applied the "electioneering message" test in holding that petitioners' expenditures had to be counted against the section 441a(d) limit. The court of appeals offered no similarly detailed analysis of how the expenditure would be treated under the "express advocacy" test proposed by *amici* and adopted by the district court. Indeed, in the only passage of its opinion addressing this question, the court of appeals indicated in *dictum* that the expenditure "would not constitute express advocacy." Pet. App. at 17a n.10.

The application of the "express advocacy" test to the facts of this case is, of course, not before this Court. If this Court instructs the court of appeals to review this case more fully in light of the "express advocacy" test, it is uncertain whether the court of appeals would find that the expenditures in question meet the "express advocacy" test. Therefore, there is no need for the Court to reach petitioners' claim of facial unconstitutionality in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE and
DOUGLAS L. JONES, AS TREASURER

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit**

THE REPUBLICAN NATIONAL COMMITTEE'S BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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No. 95-489

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE and
DOUGLAS L. JONES, AS TREASURER

Petitioners,
v.

FEDERAL ELECTION COMMISSION,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit**

BRIEF *AMICUS CURIAE*

I. STATEMENT OF INTEREST AND SUMMARY OF THE ARGUMENT

The Republican National Committee ("RNC") is the "National Committee" of the Republican Party as that term is used in the Federal Election Campaign Act of 1971 ("FECA" or "Act"), 2 U.S.C. § 431(14).[1] Under the FECA, expenditures by the RNC "in connection with the general election campaign of any candidate for President of the United States" are limited to a certain sum. 2 U.S.C. § 441a(d)(2). Expenditures by the RNC and State Committees "in connection with the general election campaign of a

---

[1] The RNC has filed this brief with the consent of all parties as reflected in letters lodged with the Clerk.

candidate" for Senator and Representative are similarly capped. 2 U.S.C. § 441a(d)(3).

The United States Court of Appeals for the Tenth Circuit, in its opinion below, construed the "in connection with the general election campaign of a candidate" language of 2 U.S.C. § 441a(d)(3) to cover "spending that involves a clearly identified candidate [of the other party] and an electioneering message, without regard whether that message constitutes express advocacy." *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995). The rule promulgated by the Tenth Circuit would apply limits on speech even though neither the political party speaking nor the opposing party whose potential candidate is mentioned have nominated their general election candidates.

This rule, if upheld, would place restrictions on any statement that mentions any incumbent President, Senator, or Representative by name unless the incumbent is not seeking or intending to seek reelection.

A political party exists in substantial part to promote the ideas of its members. Today, more so than ever before, a political party continually endeavors to communicate its message on current political issues. Such communication about political issues is central to our democracy and First Amendment protections for such speech are central to our constitutional system. Thus, the Tenth Circuit's rule would inhibit, constrain, and chill the RNC's rights of free speech to address the political issues of the day. This chilling of speech arises from the excessively vague and subjective standards for what may constitute an "electioneering message" concerning a clearly identifiable candidate. If the RNC desires to address substantive political issues but the FEC later deems the speech to be "electioneering" identified with a particular candidate, the RNC would be penalized by having its spending reallocated and/or deemed to be illegal later in the election cycle. The determination here occurred more than two years after the advertisement ran. Such determinations and penalties may well occur late in a hotly-

contested election and impair the RNC's ability to convey its message at a most critical time.

The burdens placed on the core First Amendment speech and associational rights of political parties by § 441a(d)(3) are unconstitutional because they do not rest upon compelling governmental interests nor on restrictions narrowly tailored to serve those interests. The same reasoning that led the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), to strike down Congress' attempt to limit the quantity of political discourse generally compels the same result when the limit is imposed only on a political party.

This Court has upheld FECA restrictions on political contributions because it determined such restrictions on actual or apparent *quid pro quo* relationships between donations and votes serve a compelling interest in combatting corruption or the appearance of corruption. However, when Congress adopted spending restrictions on political parties, it based its decision not on the corruption analysis underlying restrictions on individual contributions, but acted merely to close the presumed loophole in its constitutionally infirm scheme of comprehensively limiting political spending. Because this attempt to limit the totality of spending has been found to be unconstitutional, there is no justification for any restrictions on the speech of political parties. Certainly the attempts by the FEC and the Tenth Circuit to articulate how spending by political parties fits the *quid pro quo* corruption analysis fail. The Tenth Circuit in the face of this deficiency was compelled to base its decision in part on the misplaced assumption that incumbents control party spending, and that such a presumed advantage must be limited. 59 F.3d at 1024. Even if true, however, this concern represents an impermissible attempt to "level the political speech playing field" by limiting the totality of political speech. Because this impermissible policy of rationing speech underlies both § 441a(d)(3) and the opinion below, and because this policy choice is not a valid one under the First Amendment, much less a compelling interest, the opinion below must be reversed and § 441a(d)(3) declared unconstitutional.

Of course, the limitation on the quantity of political speech as voiced by political parties which is at issue here is also impermissible as a matter of statutory construction. Congress did not intend to burden the rights of political parties so sweepingly. The "in connection with" language was intended to limit the restrictions contained in the FECA, not to extend them to political speech throughout the election cycle as the Tenth Circuit would do.

II. ARGUMENT

A. 2 U.S.C. § 441a(d)(3) is Unconstitutional.

This case squarely presents the issue that the Court noted was not present in *Buckley*, whether the expenditure limitations imposed on political parties under the Federal Election Campaign Act of 1971, 2 U.S.C. § 441a, transgress the bounds of Congress's narrow power to limit freedom of speech and political association. *Buckley*, 424 U.S. at 58-59 nn.66-67. It is of compelling importance for the Court to reach this issue to complete the task, begun in *Buckley*, of freeing the exercise of core First Amendment freedoms from impermissible constraints intended to ration the amount of political discourse in our society.

The rights implicated here, freedom of speech and freedom to associate to express opinions on political issues and to influence the policies of government, are the most fundamental and precious rights in our democracy. 424 U.S. at 14. The discussion of political issues and unconstrained constitutionally protected debate on the positions and qualifications of candidates are integral to the operation of our system of government. *Id.* at 14-15. There has been, as this Court has noted, practically universal agreement that a major purpose of the First Amendment is to protect free discussion of government affairs and of the positions taken by candidates for office. The First Amendment has its fullest and most urgent application precisely in the area where § 441a(d)(3) seeks to limit the rights of political parties. *Id.*

> The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all." Mr. Justice Brandeis ... gave the principle its classic formulation:
>
> "Those who won our independence believed ... that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject....Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."
>
> Thus we consider this case against a background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open....
>
> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)(citations omitted).

Any scheme to restrict open and vigorous public debate of political issues and candidates' positions on them, no matter how well intentioned, necessarily strikes the most fundamental device for conducting the business of political parties. Where, as here, the restriction rests not on the government's laudable interest in preventing corruption, but instead upon Congress' desire to redistribute an arbitrarily quantified amount of political speech in the name of abstract

fairness, the restriction must fall. *See Buckley*, 424 U.S. at 48-49.

None of this is novel. It is merely a corollary of *Buckley*, and no new doctrine needs be established. Rather, it is well established that quantity restrictions on core political speech are invalid. 424 U.S. at 57. Nor has the Court failed to foreshadow what its conclusion should be. Since *Buckley*, the Court has continued to prune the Act's unconstitutional and unwarranted limitations on political advocacy. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*"); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985)("*NCPAC*"). Striking § 441a(d)(3) will merely complete a process long ago begun and do so by removing a limitation all the more egregious because it directly limits the political discourse of political parties, whose primary reason for existence is their exercise of First Amendment freedoms of political expression and association.

1. The Expenditure Restrictions Burden Core First Amendment Speech.

The restrictions on the total quantity of permissible party speech contained in § 441a(d)(3) are conceptually indistinguishable from the overall campaign expenditure limitations that the Court overturned in *Buckley*.

In *Buckley*, the Court considered constitutional challenges to a comprehensive campaign finance law affecting federal elections. The Act imposed limits both on the contributions that could be made to candidates and the total expenditures that candidates or anyone else could make in connection with a federal election.

The *Buckley* Court analyzed two interests advanced as sufficiently compelling to justify serious intrusions on fundamental rights. One, avoiding the corruption or the appearance of corruption, was found sufficient to justify limits on political contributions. 424 U.S. at 26. The Court

reasoned that the quantity of expression in a contribution was minimally diminished by limiting its amount. The essence of the expression is in the statement of support; how that expression was further reflected in the campaign involves speech by someone other than the contributor. *Id.* at 20-21.

The Court held that the contribution limitations do not inhibit in any material degree the potential for robust and effective political discourse among individuals, associations, the press, the candidates, and political parties. *Id.* at 28-29. Thus, the Court's analysis did not extend to the expenditure of contributed funds in political expression.

The other purported justification, levelling the playing field of political finance, was rejected. *Id.* at 48-49. In doing so, the Court held that no governmental interest suggested by the Act's defenders was sufficient to justify the restriction on the quantity of political expression imposed by campaign expenditure limitations. *Id.* at 55.

The Court also rejected any interest in equalizing the financial resources of candidates competing for federal office. Given the contribution limitation, the Court observed that the financial resources available to a candidate's campaign will likely reflect the size and intensity of his support. "There is nothing invidious, improper or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56. In striking down the limitations, the Court concluded:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57. The Court held that the expenditure limits considered in *Buckley* placed substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression, "restrictions that the First Amendment cannot tolerate." *Id.* at 58-59.

The expenditure limits applicable to political parties were not challenged on First Amendment grounds in *Buckley*. Therefore, the Court expressly noted that its sustaining of the party limitation against challenge was limited to the Fifth Amendment grounds presented. *Id.* at 58-59 nn.66-67. The pains that the Court took to draw the distinction and the sweeping and categorical language used by the Court in striking down the overall spending limits strongly suggested that the party limits suffered the same fatal infirmity.[2]

The FEC seeks to defend the quantity restrictions on parties by stating that those expenditures are deemed "contributions" under the Act. Party expenditures may be categorized as contributions for certain statutory purposes, but it is beyond question that for First Amendment analysis such expenditures are protected political speech. As such, party expenditures are no more subject to government-imposed limitations on quantity than "independent" expenditures, or overall expenditures. Here, of course, there was not even a known Republican nominee with whom to coordinate expenditures.

Nevertheless, the courts below have accepted uncritically the FEC's argument that all party expenditures in

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[2]The Court also observed that the Act's limitations on expenditures by campaign organizations and political parties would have required actual restrictions on the scope of a number of past congressional and presidential campaigns and would have constrained campaigning by candidates whose fundraising exceeded the ceiling. 424 U.S. at 20. Thus the burden of both limitations was seen to be real and direct. When it struck the overall limits, the Court did not differentiate the campaign limits from the party limits in terms of their effects.

connection with campaigns of their candidates are "coordinated" expenditures, and thus "contributions," not only for the purposes of 2 U.S.C. § 441a(a)(7)(b)(i) but for the purposes of First Amendment analysis. *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1452-53 (D.Colo. 1993); 59 F.3d at 1023-24. While the Court in *Buckley* recognized the effect of the statutory provision characterizing certain expenditures as contributions, 18 U.S.C. § 608(c)(2)(B), 424 U.S. at 47 n.53 (albeit different from 18 U.S.C. § 608(e)(1), the provision actually under challenge and construed in the opinion), the Court did not then nor has it subsequently held that party expenditures have diminished First Amendment protection. Yet that is the practical effect of the decision below.

2. Congress Did Not Purport to Restrict the Quantity of Party Speech to Combat Corruption but in a Misguided Effort to "Level the Playing Field" Through a Comprehensive Regulatory Scheme to Limit Political Spending.

The legislative history of the Federal Election Campaign Act demonstrates that Congress intended to strengthen political parties and to continue their prominent role in campaign finance.

> [A] vigorous party system is vital to American politics... Under the Committee bill, parties will retain their essential nonfinancial responsibilities in electoral politics. More important, the bill retains the role of political parties in private financing for federal candidates....[T]he Committee recognizes that pooling resources from many small contributors is a legitimate function and an integral part of party politics. Accordingly, the bill includes a special provision for private funding by political parties.

S. Rep. No. 689, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5593; *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981) (§ 441a(d)(3) assures that political parties will continue to have an important role in federal elections).

The limitation that now appears in § 441a(d)(3) was one of a series of such limits adopted in 1976. Where political action committees could spend no more than $5,000 on behalf of a single candidate, a political party could spend proportionally to the voting age population in national, state or district.[3]

The Congressional debate in 1974 over amendments to the contribution and expenditure limits applicable to Republican and Democratic Senate and House campaign committees illustrates Congress' intent that political party committees be treated no differently from independent political committees in being subject to spending limits. Immediately before passage of his amendment restoring the limitations applied to political parties, Sen. Clark said:

> As it reported the bill, the committee said in effect that these "in-house" committees would be restricted exactly the same way as other political committees.... The committee's original judgment was correct. To permit unlimited expenditures would be a mistake.

120 Cong. Rec. 10060, 10063 (April 8, 1974).

The Court has struck down as unconstitutional the Act's limitation on independent expenditures by individuals in *Buckley*, by political committees in *NCPAC*, and by certain corporations in *MCFL*. Yet, political parties and their

[3]In a Senate race, for example, this might be as much as $2,121,450 in California, $406,500 in Tennessee, or $288,000 in Iowa. 120 Cong. Rec. 10060 (April 8, 1974). The limits are adjusted annually. 2 U.S.C. § 441a(c)(1).

committees remain subject to expenditure limits. To restore symmetry and coherence, the limits on political speech by political parties must be removed.

None of the Court's decisions since *Buckley* address the question of severability of the unconstitutional provisions. Congress intended political parties to be favored sources of campaign finance by granting them higher limits than independent committees. Yet the Court has invalidated the limits on practically all of the actors except political parties, thus rendering political parties uniquely disfavored, contrary to congressional intent.

The relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress without the unconstitutional provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Congress did not intend to restrict political party expenditures when other expenditures were unlimited. The limits of § 441a(d)(3) are a relic of a scheme discredited by the Court's First Amendment analysis in *NCPAC* and *MCFL*. Moreover, the continuing limitation subverts Congress' intent that political parties play a significantly greater role proportionally than an individual or special interest group, as well as its intent to treat party and independent political committees alike by being limited by spending restrictions.

The Court has recognized that Congress may restrict political expenditures by certain business organizations because their financial situation is the result of economic power in the marketplace of commerce, not persuasive power in the marketplace of ideas. *MCFL*, 479 U.S. at 257-59. No similar restraint should apply to a political party, an organization that only exists in the political marketplace. As the Court said of the corporation in *MCFL*, a political party is formed to disseminate ideas, not to amass capital. *See id.* at 259. The resources that it has available are a not a function of its success in the economic marketplace, but its popularity in the political marketplace. Thus, no valid interest underlies the spending limits on political parties.

3. There is No Compelling Interest Sufficient to Justify Limiting Expenditures by Party Committees.

In *NCPAC*, the Court made clear that:

> preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.

470 U.S. at 496-7. Far from identifying any new or other legitimate and compelling government interest in this case, the Tenth Circuit simply identifies the same interests, but reaches the wrong result. What the Court stated in invalidating the Act's restrictions in *NCPAC* applies with equal or greater force to limitations on expenditures by political parties:

> But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

Id. at 498.

The Court struck down limitations on individual independent expenditures in *Buckley* and on independent political committee expenditures in *NCPAC* because it found no tendency in such "uncoordinated" expenditures to corrupt or give the appearance of corruption. *Id.* at 497. In contrast, the Court has upheld direct restrictions on expenditures by corporations, banks and labor unions, because their relative economic power may be no reflection of the power of their ideas, and may represent money improperly diverted from other sources. *See MCFL*, 479

U.S. at 258 (citing *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 423-24 (1972)).

The independent expenditures of individuals, political action committees, and corporations like *MCFL* are not limited, and cannot be limited constitutionally. In contrast, by administrative regulation, political parties are deemed incapable of making independent expenditures. 11 C.F.R. § 110.7(B)(4) (1981). All expenditures are deemed "coordinated".

As receivers of contributions and sources of expenditures, political parties are not distinguishable from the corporation in *MCFL*, which the Court held could not be restrained in its expenditures in support of candidates:

> Individuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money may ultimately be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use the funds in a manner that best serves the shared political purposes of the organization and contributor. In addition, an individual desiring more control over the use of his or her money can simply earmark the contribution for a specific purpose.... Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

Id. at 260-61 (citations omitted). Nor are a party's fundraising activities distinguishable from NCPAC, whose

primary purpose was to attempt to influence directly or indirectly the election or defeat of candidates for federal, state or local offices by making contributions and its own expenditures. 470 U.S. at 490. The Court rebuffed the FEC's attempt to regulate NCPAC and FCM, rejecting the notion that the PACs' form of organization or method of solicitation diminished their entitlement to First Amendment protection. *Id.* at 494.

Clearly, political parties in their advocacy role are like the corporation in *MCFL*, the political action committees in *NCPAC*, and the individuals in *Buckley* and not like the banks, unions and business corporations that Congress and the Court have consistently found to pose risks of corruption.

While political parties are more like the unregulated special interest groups, they are also distinctive in the numbers and breadth of their membership and the diversity of views and interests represented. Political parties differ from other interest groups in the extent to which parties pursue their organizational activities through contesting elections; the breadth and inclusiveness of the party organization and membership; the sole concentration of parties on political activities for achieving their goals; and their strength as reference symbols for the electorate. Kirk T. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L.REV. 53, 98 (1987) (citing F. SORAUF, PARTY POLITICS IN AMERICA 15-18 (5th Ed. 1984)). These characteristics distinguish political parties from special interest groups. By their nature, political parties are less susceptible to *quid pro quo* corruption than special interest groups. Nevertheless, political parties are more strictly regulated than such groups. There is simply no justification for regulating political party expenditures, whether coordinated or independent, more strictly than those of special interest groups.

4. The Policy Against *Quid Pro Quo* Donations is Not Implicated by Political Party Expenditures.

Only the *quid pro quo* corruption analysis has been recognized by the Court as sufficiently compelling to justify regulation of the basic First Amendment Rights implicated here. *NCPAC*, 470 U.S. at 496-97.

Even under the broadest formulation, a political party's expenditures in support of its candidates cannot be fitted into the *quid pro quo* model. Indeed, in our current issue-dominated political culture, a party's espousement of ideas is a critical dynamic in our electoral system, even leading some officeholders and candidates to change political affiliation.

Voters may properly expect a party's candidates to support and advocate the positions of the party. Increasing the level of party support reinforces party identity. It is impossible for a political party to corrupt its own candidates in the sense defined by the Court. Nahra, 56 FORDHAM L.REV. at 105-06. The candidate's adherence to the party's positions, even if influenced by financial support, is not corruption. *Id.* (citing *NCPAC*, 470 U.S. at 498). Far from "corrupting" the candidate, this encourages increased candidate loyalty and responsiveness to the party, which tends to free the candidate from the need to rely on the financial support of special interest groups. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1912 (1995) (Thomas, J., dissenting) (stating that scholars believe campaign finance laws give large financing role to entities with incentives to curry favor with incumbents); *NCPAC*, 470 U.S. at 517 n.12 (White, J., dissenting) (observing that the system of campaign financing virtually forces Members of Congress to beg money from special interest groups and political action committees whose sole purpose for existing is to seek a *quid pro quo*).

Thus, the *quid pro quo*, if any, in party-candidate relations is closer identity between the positions of the party

and those of its candidates. The natural result is diminished reliance on the very contributions where the *quid pro quo* may produce undesirable results.

Contributions to political parties are restricted in size under the Act, 2 U.S.C. § 441a(a)(1). Contributions made to and reported by the party are free of the taint of *quid pro quo*. The party's expenditure of funds in pursuit of its goals, not as symbolic contributions but as protected political expression, cannot be hobbled by expenditure limitations that impermissibly restrict the rights of political associations to engage in protected political expression. *See Buckley*, 424 U.S. at 58-59.

5. The Application of 2 U.S.C. § 441a(d)(3) by the Court Below is Unconstitutional Because It is a Restriction on Political Speech Based on Content.

The application of the expenditure limitation by the court below is unconstitutional on the additional ground that it regulates political speech based on content. The advertisement concerning then Congressman Wirth was a violation of the Act *only* because of its content, specifically, its identification of a "candidate" and its "electioneering message" as subjectively determined by the FEC. 59 F.3d at 1022-23. Other advertisements by the identical entity, differing only in their failure to mention Wirth's senatorial aspirations, were never challenged by the FEC. App. 93a-98a, 100a-105a.

The Court applies the most exacting scrutiny to regulations that suppress, disadvantage or impose differential burdens on speech based on its content. *Turner Broadcasting Sys. v. FCC*, 114 S.Ct. 2445, 2459 (1994). "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.*; *see, e.g., Boos v. Barry*, 485 U.S. 312, 318-21 (1988).

By no stretch of reasoning can the advertisement here survive strict scrutiny. No risk of a corrupt *quid pro quo* exists, particularly where there was no Republican candidate yet selected who could benefit from the expenditure, and no basis thus exists for content-based regulations under the law.

B. If § 441a(d)(3) Were Constitutional, It Would Restrict Only Express Advocacy Regarding Voting in a General Election.

Even if the Act were otherwise constitutional, it would be necessary to interpret the "in connection with" requirement of § 441a(d)(3) narrowly and to adopt the "express advocacy" standard applied to this precise language in other provisions of the Act. *Buckley*, 424 U.S. at 41-45.

The First Amendment protects the speech and associational rights of political parties. Indeed, as Congress observed in adopting the FECA, one "crucial function" political parties serve in an election is to "publiciz[e] issues." S. Rep. No. 689, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5594. This kind of core political speech involving "[d]iscussion of public issues and debate on the qualification of candidates" lies at the heart of the First Amendment and is entitled to "the broadest protection." 424 U.S. at 14.

Rather than interpreting the "in connection with" language of § 441a(d)(3) narrowly in an attempt to minimize constitutional challenges by requiring "express advocacy," the FEC and the Tenth Circuit have construed it broadly to require only a "clearly identified candidate" and an "electioneering message." 59 F.3d at 1622. The challenged advertisement in this case merely identified a candidate and discussed his stance on defense issues. (App. 104a-105a).

By eschewing a bright line embracing the narrow interpretation of the statutory text embodied in the "express advocacy" standard, and instead deciding in favor of the malleable standard the FEC favors in this case, the court of

appeals (1) disregarded this Court's prior interpretation of the same "in connection with" language in a related section of the Act which has been held to require "express advocacy;" (2) contravened Congress' intent to favor political parties in connection with spending limits; and (3) improperly deferred to inconsistent agency interpretations of the statute contained in two of three non-binding advisory opinions.

1. The Tenth Circuit Should Have Read § 441a(d)(3) in a Manner Consistent with This Court's Interpretation of Identical Language From the Same Act.

The Committee's expenditure at issue is not subject to the limitations imposed by § 441a(d)(3) unless the expenditure was made "in connection with the general election campaign." In *MCFL*, this Court previously interpreted the identical statutory language in the context of § 441b of the Act. This Court ruled that an expenditure "must constitute 'express advocacy' to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249. The Court, applying *Buckley*, reasoned that a narrow interpretation of the statutory language would better protect core First Amendment speech. *See id; Buckley*, 479 U.S. at 41-44. Applying *MCFL*, the district court here correctly interpreted the phrase "in connection with the general election campaign" to mean that an expenditure must involve "express advocacy" in order to be subject to the restrictions of § 441a(d)(3). 839 F. Supp. at 1453-54. The district court applied *MCFL* to § 441a(d)(3) because §§ 441a(d)(3) and 441b had similar purposes. Following well-established rules of statutory construction, the district court gave the phrase "in connection with the general election campaign" the same meaning in § 441a(d)(3) as it had in § 441b. *Id.* at 1453.

To establish a more broad application, the Tenth Circuit held that Congress intended to ascribe a different meaning to § 441a(d)(3) because the words were found "in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with

different intent." 59 F.3d at 1020. The court of appeals then ruled that § 441a(d)(3) regulated expenditures that both depicted a clearly identified candidate and conveyed an electioneering message. *Id.* at 1022.

It is well-settled that in instances where different parts of the same act have similar purposes, this Court assumes that identical words used in different parts of the same act are intended to have the same meaning. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2591 (1993); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

Both §§ 441(b) and 441a(d)(3) were intended to regulate the expenditures of multi-person organizations. More importantly, both sections were adopted in an attempt to comprehensively regulate contributions and spending. Because political parties compete not in the marketplace for money but in the marketplace of ideas, § 441a(d)(3) if anything, should be more narrowly construed than § 441(b).

The Tenth Circuit's opinion also misread the Court's reservation of the present question in *Buckley*. 59 F.3rd at 1020-21. The Court's discussion of political party expenditures at note 67 accepted, but did not validate, the treatment of party expenditures as "coordinated" expenditures because the issue was not before the Court for First Amendment analysis. *Buckley*, 454 U.S. at 59 n.67. Thus, the Tenth Circuit's reliance on this note is misplaced.

The lower court's only other basis to ignore established rules of statutory construction is what the opinion terms "some evidence" of congressional intent. 59 F.3rd at 1021. Given the core First Amendment rights at issue, the Tenth Circuit's reasoning on the rule of statutory construction relied upon by the district court is clearly erroneous.

2. The Commission's Construction of § 441a(d)(3) as Regulating Political Committee Expenditures Depicting a Clearly Identified Candidate and Conveying an Electioneering Message is Not a Construction to Which This Court Must Defer.

The court of appeals ruled that it was compelled to adopt the FEC's interpretation of § 441a(d)(3) because the Commission's construction of the statute was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As *Chevron* and its progeny make clear, however, "the courts are the final authorities on issues of statutory construction, and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions . . ." *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (quoting *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968)) (citations omitted); *see Chevron*, 467 U.S. at n.9. The Tenth Circuit's deference to the FEC's interpretation of § 441a(d)(3) is wholly unwarranted because the Commission's present interpretation of this statute is (1) not consistent with prior FEC rulings and (2) contrary to Supreme Court precedent and the Constitution.

The FEC initially adopted the "express advocacy" reading of § 441a(d)(3). 59 F.3d at 1022 n.7 (citing FEC Advisory Opinion, 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978)). In two subsequent advisory opinions, however, the FEC adopted its current construction of the statute. *Id.* at 1021-22. The court of appeals ruled that notwithstanding the FEC's change in interpretation, it was required to give the FEC's current view deference. *Id.* at 1022 n.7 (citing *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991)). *Rust* held, however, that this change in interpretation must be justified by "a reasoned analysis." *Rust*, 500 U.S. at 187 (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

This Court should examine the thoroughness, validity and consistency of the Commission's interpretation of § 441a(d)(3) in determining the amount of deference to give the Commission's construction of the statute. *Sloan*, 436 U.S. at 117-18; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978). The two Commission rulings on which the Tenth Circuit purported to rely upon fail to explain the FEC's justification for changing its construction of § 441a(d)(3). Because this Court only can speculate about the Commission's reasons for changing its interpretation of the statute, deference is not warranted. *See Sloan*, 436 U.S. at 118; *see also State Farm*, 463 U.S. at 43. Indeed, it was this lack of consistency and thoroughness which prompted the district court to discard the Commission's interpretation of the statute. 839 F. Supp. at 1455.

Additionally, the FEC's interpretation of § 441a(d)(3) is not entitled to deference under *Chevron* if it is inconsistent with the Supreme Court's interpretation of the statute or the Constitution. *See Lechemere, Inc. v. NLRB*, 112 S. Ct. 841, 847 (1992) (quoting *Maislyn Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)). As explained above, this Court previously has interpreted the phrase "in connection with any election" to mean "express advocacy" in the context of § 441b.[4] *MCFL*, 479 U.S. at 248-49. Similarly, in *Buckley*, the Court construed a restriction on expenditures "relative to clearly identified candidates" as restricting expenditures involving "express advocacy." *Buckley*, 424 U.S. at 41-42. The FEC has ignored this precedent in interpreting § 441a(d)(3) to reach expenditures that depict a clearly identified candidate and convey an electioneering message. Furthermore, the Commission's broad interpretation of the statute is inconsistent with the Constitution because it impermissibly infringes upon the First

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[4]It is noteworthy that every lower court interpreting the phrase "in connection with" as it is used in the Act has ruled that it means "express advocacy." *See, e.g., Faucher v. FEC*, 928 F.2d 468, 470-72 (1st Cir.), *cert. denied sub. nom.*, 502 U.S. 820 (1991); *Orloski v. FEC*, 795 F.2d 156, 166-67 (D.C. Cir. 1986).

Amendment rights of political parties. *See supra* at pp. 6-16; *see also MCFL*, 479 U.S. at 249; *Buckley*, 424 U.S. at 41-44.

III. CONCLUSION

This Court should declare the limits contained in § 441a(d)(3) of the Act unconstitutional consistent with its prior rulings striking down spending limits by other political advocates. It should also interpret the operative language consistently with its construction of the same language elsewhere in the Act.

Respectfully submitted,

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(13)

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as Treasurer,

Petitioners,

—v.—

FEDERAL ELECTION COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENT

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IN THE

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No. 95-489

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as Treasurer,

Petitioners,

—v.—

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice is a partnership between law clerks who served Justice William Brennan, Jr., during his thirty-four years as an Associate Justice of the United States Supreme Court, and the faculty of New York University School of Law, designed to honor Justice Brennan. Before giving his blessing to the enterprise, Justice Brennan extracted a promise that the Brennan Center would function

[1] The parties have consented to the filing of this brief. Letters of consent will be lodged with the Clerk of the Court.

as a genuinely independent center of thought on significant legal issues affecting American life. He particularly insisted that no special deference be paid to his views, or to his opinions. Justice Brennan played no role in the formulation of this brief, or in the decision to file a brief in this case.

The Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. In keeping with Justice Brennan's legendary contributions to the law of American democracy, the Center has chosen to concentrate initially on a Democracy Project. The Brennan Center's initial effort at democratic law reform litigation resulted in the invalidation of unconstitutionally restrictive ballot access laws governing the Presidential primary process in New York State. *Rockefeller v. Powers*, No. 96-7173 (2nd Cir. Feb. 29, 1996). *Amicus* submits this brief in the hope that it will prove useful to the Court in considering the difficult First Amendment issues raised by efforts to regulate the financing of election campaigns.

STATEMENT OF THE CASE

In the Spring of 1986, the Colorado Republican Party made two important decisions. First, the local party decided to assign its entire federal spending ceiling for the forthcoming Senatorial election[2] to the national party pursuant to *FEC v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27 (1981). Next, the local party decided to sponsor negative advertising costing approximately $15,000 attacking the record of Tim Wirth, a probable Democratic candidate for the

[2] Under 2 U.S.C. section 441a(d)(3), the Colorado Republican party was authorized to spend approximately 4.4 cents per voter in support of candidates for the Senate in 1986, or approximately $145,000. The local party elected to assign the full amount to the national party.

Senate. Since the assignment to the national party had exhausted the local party's spending authority, the FEC alleged that the $15,000 negative advertisement placed the local party over the spending limits set by Section 441a(d). The District Court ruled that the advertisement did not include "express advocacy" of the election or defeat of a candidate and, thus, fell outside the coverage of the FECA. The Tenth Circuit reversed, finding that the advertisement was an "electioneering message" falling within the Act's coverage. The Circuit rejected a First Amendment challenge to the Act's spending limits, holding that the spending limits on local political parties imposed by Section 441a(d) are justified as an effort to prevent corruption and to equalize access to the electoral process.

SUMMARY OF ARGUMENT

Tension exists between the First Amendment right of individuals to spend money in an effort to elect a favored candidate,[3] and the moral imperative of an elected official to be

[3] See, Eg., *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating ceilings on independent campaign expenditures by individuals and candidates); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating ceiling on independent campaign expenditures by PAC's); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S, 238 (1986) (invalidating ban on corporate campaign expenditures by nonprofit corporation "akin to [a] voluntary political association"). See also *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating $250 ceiling on contributions to committees formed to support or oppose ballot initiatives); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on paid petition circulators for ballot initiative); *Brown v. Hartlage*, 456 U.S. 45 (1982) (invalidating ban on campaign promise to take salary cut). But see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on corporate independent expenditures in support of state and local candidates); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 ceiling on contributions from unincorporated associations to multi-candidate political action committees); *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (upholding ban on solicitation of general public by corporate PAC's;

more than a mere conduit for the wishes of her most vocal (or powerful) constituents.[4] In a world where money is indispensable to electoral success[5], the relentless need to appeal to prospective donors may render it extremely difficult for a candidate or an elected representative to exercise, and to appear to exercise, the independent choice on which the moral integrity of democracy depends. A political system in which candidates must continuously, and publicly, appeal to self-interested donors in order to mount a credible electoral campaign risks losing the confidence and respect of the vast bulk of the electorate who lack the funds to bid in the electoral auction.

For the past twenty years, Congress has sought to safeguard both the First Amendment right to spend money in support of favored candidates, and the democratic imperative of candidate independence, by closely regulating contributions to federal candidates, while leaving independent and candidate expenditures essentially unregulated.[6] Petitioner's constitu-

solicitation confined to shareholders, executives, and administrative personnel).

[4] See generally, Edmund Burke, *Address to the Electors of Bristol* (1774) (reprinted in Conor Cruise O'Brien, *The Great Melody* (1992) at 74-75; Abraham Lincoln, in the *Lincoln-Douglas Debates* (1854), described in David Herbert Donald, *Lincoln*, at 173-178. See also *Federalist* 10 (Madison).

[5] For the intense relationship between money and electoral success, see, Eg., Herbert E. Alexander, *Financing Politics: Money, Elections and Political Reform* (1992); *Money and Politics in the United States* (Michael J. Malbin ed. 1984); David B. Magelby & Candice J. Nelson, *The Money Chase: Congressional Campaign Finance Reform* (1990); Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* (1990); Frank J. Sorauf, *Money in American Elections*, (1988); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160 (1994); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 Colum. L. Rev. 1281 (1994).

[6] It is a fiction to ascribe the current regulatory scheme, which draws a bright line between contributions and independent expenditures,

tional argument threatens to open a massive contribution loophole through which corporations, labor unions and wealthy donors, barred from making contributions directly to candidates for federal office, can indirectly exercise the real and perceived leverage over candidates explicitly denied to them by the 1974 Act by exploiting the influence acquired through enormous "soft money" contributions to local political parties. In a world in which the soft money loophole did not exist, local political parties might well play a more constructive role in the financing of federal elections. But local political parties cannot have it both ways. They cannot choose to be awash in cash from soft money donors who are forbidden to contribute to a federal election campaign, while simultaneously demanding to be permitted to disburse limitless amounts of money to candidates for federal office.

Moreover, by highlighting the questionable distinctions and elaborate regulations required by *Buckley*, this appeal reveals that the analytic framework established by *Buckley v. Valeo* is inadequate to the task of dealing with the complexities of campaign financing. The conventional *Buckley* analysis, which increases the difficulty of raising money, while making it impossible to control expenditures, has created an unacceptable *status quo*. With the benefit of twenty years of hindsight, *amicus* urges the Court to reconsider the bright-line distinction between contributions and expenditures established in *Buckley*, and to recognize that Congress may regulate every phase of the campaign finance process when it is demonstrably necessary to protect against corruption, or to safeguard both the reality and the appearance of an elected official's ability to exercise independent moral choice.

to Congress. Congress sought to regulate both contributions and expenditures in the 1974 Amendments to the 1971 Federal Election Campaign Act. This Court invalidated the expenditure regulations, while upholding the restrictions on campaign contributions. *Buckley v. Valeo*, 424 U.S. 1 (1976).

ARGUMENT

I. IN VIEW OF THE ENORMOUS FLOW OF "SOFT MONEY" CONTRIBUTIONS FROM CORPORATIONS, LABOR UNIONS AND WEALTHY INDIVIDUALS TO LOCAL POLITICAL PARTIES, THE SPENDING CEILING IMPOSED BY SECTION 441a(d) IS NECESSARY TO DEFEND THE INTEGRITY OF CONGRESS' DECISION TO RESTRICT CAMPAIGN CONTRIBUTIONS FROM SUCH DONORS TO CANDIDATES FOR FEDERAL OFFICE

Congressional efforts to regulate campaign financing are designed to insulate candidates and elected officials from financial arrangements that risk the reality or appearance of *quid pro quo* corruption or bribery. See *Buckley*, at 24; *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985). See generally David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994); Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 Hofstra L. Rev. 301 (1989). An integrated set of regulations governing the disclosure,[7] source,[8] and

[7] Controversial parties may obtain an exclusion from the disclosure rules on a showing of a "reasonable probability of threats, harassment, or reprisal". *Brown v. Socialist Workers' 74 Campaign Committee*, 459 U.S. 87 (1982).

[8] Business corporations have been prohibited from contributing to federal election campaigns since the passage of the Tillman Act in 1907. For the history of Congressional efforts at campaign finance reform, see, *Congressional Quarterly, Dollar Politics*, (3rd ed. 1982). Compare, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding state ban on independent expenditures by business corporations in contested elections), with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating state ban on corporate expenditures in connection with ballot initiative). Non-profit corporations whose sole purpose is the advancement of ideas are free from expenditure restrictions, *FEC v. Massachusetts Citizens' for Life, Inc.*, 479 U.S. 238 (1986), but

amount[9] of campaign contributions attempts to limit the ability of business corporations, labor unions, and wealthy individuals to exercise, or to appear to exercise, "corrupt" undue influence over candidates or elected officials. *Buckley* at 26-27. Most importantly, corporations and labor unions are flatly barred from contributing funds directly to any candidate for federal office, and wealthy individuals are severely limited in the amounts they can contribute.

The spending ceiling imposed by Section 441a(d) is necessary to maintain the integrity of the existing ban on contributions from corporations, labor unions and wealthy individuals. Although one would not know it from petitioner's brief, local political parties like the Colorado Republican Party have been, and remain, the recipients of hundreds of millions of dollars in so-called "soft money" contributions from precisely those interests - business corporations, labor unions, and wealthy individuals - that are precluded from contributing directly to candidates for federal office.[10] In the absence of the spending ceiling imposed by section 441a(d), even if the soft money itself could be kept from "bleeding" directly into federal campaigns - a dubious proposition - soft money donors, barred from exercising direct influence over federal candidates, will inevitably exercise enormous indirect

remain subject to contribution regulations. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981).

[9] The Federal Elections Campaign Act imposes a $1,000 ceiling on individual contributions to a federal candidate in a primary and a general election; a $5,000 ceiling on contributions to a multi-candidate PAC; and a $25,000 annual ceiling on an individual's total federal contributions. The Act's contribution ceilings were upheld in *Buckley* (individual), and *California Medical Ass'n* (PAC).

[10] For a summary of 1995 "soft money" contributions to political parties, see *Report of the Center for Responsive Politics* (March 4, 1996). Description of soft money giving patterns in the text are drawn from the Center's Reports, which are, in turn, based upon an analysis of reports filed with the Federal Election Commission.

influence over federal candidates by influencing the local party's decision as to which federal candidates are to receive money from the party.

"Soft money", a euphemism for political contributions falling outside the purview of federal regulation, began modestly in 1980 as a means of funding local voter registration drives. In recent years, however, soft money contributions to local political parties have cascaded into a flood of dollars from corporations, labor unions, and wealthy donors that threaten the integrity of the Act's federal contribution restrictions. For example, during 1995, the Democratic and Republican Parties raised almost $60 million dollars in "soft money" contributions, predominantly from contributors who would have been barred from contributing to a federal election campaign. The Democratic Party raised $25 million dollars; the Republican Party raised $33.7 million dollars. 82% of Republican soft money came from business corporations. 55% of Democratic soft money came from business corporations, with an additional 36% coming from wealthy individuals. Thus, in 1995, business corporations donated more than $41 million dollars to local political parties. According to the Center for Responsive Politics, the leading 1995 soft money contributors were:

Democrats		Republicans	
Dirk Ziff	$380,000	Phillip Morris	$992,149
AT&T	$313,000	RJR Nabisco	$696,450
Seagram & Sons	$285,000	AT&T	$370,000
MCI	$279,750	American Financial	$330,000
Miramax Films	$276,000	Atlantic Richfield	$322,175
B.L. Schwartz (Loral Corp.)	$240,000	News America	$265,000
Lazard Frères	$235,000	Brown & Williamson	$265,000

Democrats		Republicans	
Dream Works	$225,000	Archer-Daniels-Midland	$225,000
Anheuser-Busch	$215,250	Time-Warner	$250,000
Laborers' Union	$205,000	Textron	$218,700
MCA	$200,000	NYNEX	$206,405
Connell Co.	$200,000	Paine Webber	$195,000
Phillip Morris	$199,000	Forstmann, Little	$185,000
Atlantic Richfield	$185,500	Reliance Group	$180,000
Milberg, Weiss	$180,000	Seagram & Sons	$175,000
Johnny Chung (Automated Intelligent Systems)	$175,000	Blue Cross	$161,203
Stallion USA	$150,000	Limited, Inc.	$160,000
RJR Nabisco	$126,250	Pfizer	$156,000
IBEW	$125,000	US Asia	$150,000
Entergy Corp.	$121,500	Pilgrims' Pride	$150,000

With particular relevance to this case, in 1991-92, the Colorado Republican Party received a soft money contribution of $465,000 from a single wealthy donor. See *Soft Money in the States: A Survey of Contributions in the 1992 Elections* (Center for Responsive Politics 1994).

While, under current law, the proceeds of such "soft money" contributions may not be transferred by a political party directly to federal candidates,[11] the existence of an enor-

[11] Taken to an extreme, petitioner's constitutional argument would permit local political parties, as First Amendement entities, to act as conduits for soft money to federal candidates in unlimited amounts.

mous pot of "soft money" just below the federal waterline poses two distinct threats to the integrity of the federal regulatory scheme. First, a significant danger exists that soft money will "bleed" directly into federal campaigns,[12] giving the corporate, labor and wealthy individual donors precisely the dangerous leverage that Congress sought to prevent. Even when it can be accurately traced, soft money is often used to finance political activities that benefit both the local and the national ticket. Partisan get out the vote drives, and partisan voter registration drives are the two most obvious examples. The close link between soft money and national elections is demonstrated by the recurrent upsurge in soft money activity in states with close national elections in the five weeks prior to the election.

More importantly, soft money donors will inevitably exercise, or appear to exercise, significant influence over the local political parties they bankroll, including influence over which federal candidates receive money from the local party. A candidate or elected representative who must cater, or appear to cater, to soft money corporate, labor or wealthy donors in order to receive money from a local party, however lawfully those funds were raised, will find himself in precisely the moral predicament that Congress sought to avoid when it banned direct contributions from corporations and labor unions, and restricted contributions from the wealthy. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981).

Current law, however inadequately, seeks to minimize the influence exercised by soft money donors over federal elections by imposing spending ceilings designed to limit the amounts that local parties can funnel to federal candidates.

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12 National and local political parties are permitted to transfer soft money back and forth in an often bewildering series of transactions that are, often, difficult to disentangle. Local parties are permitted to assign their local 441a(d) spending quota to the national party, which, in turn either re-assigns, or expends the sum. *FEC v. Democratic Senatorial Campaign*, 454 U.S. 27 (1981).

Under section 441a(d), the amounts that local parties can disburse in aid of a federal candidates are deemed too small to pose a credible threat to candidate independence. If, however, petitioners are successful in destroying the 441a(d) ceiling, the soft money loophole will further erode - and eventually destroy - the existing regulatory system. Corporate, labor, and wealthy individual contributors seeking to maximize their political influence will simply: (1) contribute generously to local parties under the soft money loophole; (2) encourage local parties to raise substantial hard money funds from legitimate sources; and (3) exercise significant influence over which federal candidates receive the unlimited financial support from the party. Such a scheme simply replicates the reality and appearance of undue influence by corporations, labor unions and wealthy donors that Congress sought to avoid in the first place. In *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), this Court upheld the $5,000 limit placed on contributions by unincorporated associations to multi-candidate PAC's, ruling that unlimited contributions to multi-candidate PAC's would raise the specter of real and apparent undue influence because a donor could use the PAC's to circumvent direct restrictions. Precisely the same considerations apply to petitioner's effort to permit local political parties to make unlimited contributions to candidates for federal office. Candidates seeking the unlimited largesse of a local political party, however carefully that largesse is raised, will be forced to curry favor with the corporate, labor and wealthy donors who bankroll the local party, creating the very climate of undue influence that led Congress to limit their ability to contribute directly.[13]

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13 *Amicus* takes no position on two significant issues. The question of whether "express advocacy" or mere "electioneering activity" is necessary to trigger the Act is a close question to which, *amicus* suggests, deference to the FEC's expertise is appropriate. Nor does *amicus* take a position on whether the proposed standard of "electioneering activity", as narrowed by the FEC's Advisory Regulation dated March 31, 1995, is unduly vague or overbroad.

(footnote continued)

In a world in which the soft money loophole did not exist, local political parties might well play a more constructive role in the financing of federal elections. But local political parties cannot have it both ways. They cannot choose to be awash in cash from soft money donors who are forbidden to contribute to a federal election campaign, while simultaneously demanding to be permitted to disburse limitless amounts of money to candidates for federal office.

II. EXPERIENCE TEACHES THAT THE ANALYTICAL FRAMEWORK AND FACTUAL ASSUMPTIONS OF *BUCKLEY v. VALEO* ARE INADEQUATE TO DEAL WITH THE CONSTITUTIONAL ISSUES RAISED BY CONGRESSIONAL EFFORTS TO REGULATE CAMPAIGN FINANCING.

A. The Conventional *Buckley* Analysis

Conventional analysis of efforts to regulate campaign financing follows a well-trodden path established twenty years ago by *Buckley v. Valeo*, 424 U.S. 1 (1976). First, spending money to influence an election is equated with speech, triggering full First Amendment protection. Second, a bright-line distinction is drawn between independent expenditures and contributions (or coordinated expenditures). Independent expenditures on behalf of a candidate are equated with pure speech and accorded the highest level of First Amendment protection. Contributions to candidates are viewed as one level removed from direct speech, triggering a somewhat lower level of free speech protection. Both expenditures and contributions are, however, deemed sufficiently imbued with First Amendment protection to require a showing of compelling state interest as a condition of regulation.

Finally, *Amicus* believes that the outcome of this case should not turn on whether the activity at issue herein is labelled a "contribution", an "independent expenditure", or a "coordinated expenditure". Whatever the activity is ultimately called, it involves financial support that risks the very undue influence by corporate or wealthy donors that Congress sought to prevent. For the reasons set forth in Point II, *infra*, *amicus* urges the Court to refrain from deciding campaign financing cases on the basis of conclusory labels that mask underlying reality.

Next, potential state interests are canvassed to determine whether they justify regulation. The risk of actual, or perceived, "corruption" or bribery qualifies as sufficiently compelling to justify regulation of financial transactions posing a significant risk of "corruption". The inherent inequality of using wealth to influence elections is recognized as a legitimate governmental concern, but, under a conventional reading of *Buckley*, limits on expenditures (as opposed to contributions) designed to enhance equality have been deemd constitutionally forbidden, unless they are a condition of receiving public financing. Significantly, *Buckley* makes no attempt to canvass other potential state interests that might justify campaign regulation.

Direct contributions to candidates (or coordinated expenditures) are deemed to pose a sufficiently high risk of the reality, or appearance, of *quid pro quo* corruption to justify disclosure rules, stringent ceilings, and prohibitions on corporate and labor contributions. See *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 ceiling on contributions from unincorporated associations to multi-candidate political action committees). But see *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating $250 ceiling on contributions to committees formed to support or oppose ballot initiatives); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on paid petition circulators for ballot initiative).

Independent expenditures, however, no matter how large and no matter how they are perceived by the public, are deemed to pose little or no risk of quid pro quo corruption, and thus are exempt from regulation[14], with the significant

[14] *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating ceiling on independent campaign expen-

exception of business corporations, which are constitutionally entitled to expend corporate funds on ballot initiatives, but may be banned from making independent expenditures on behalf of candidates in contested elections. Compare *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on corporate independent expenditures in support of state and local candidates), with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating ban on corporate expenditures in connection with ballot initiative). Candidate expenditures are, likewise, virtually exempt from regulation, unless the regulations are a condition of accepting public financing.

B. The Artificial Nature of the Distinctions Drawn by *Buckley*, and the Unfortunate Practical Impact of the Opinion

With the benefit of twenty years of experience, several of the attenuated distinctions and factual assumptions central to *Buckley* appear questionable. Most importantly, the critical distinction between contributions and independent expenditures that forms the core of the opinion appears to rest on two questionable props. First, the *Buckley* Court's assertion that an independent expenditure on behalf of a candidate is a more direct form of speech than a campaign contribution to a candidate was highly controversial in 1976, and remains unpersuasive today. The open espousal of political association that characterizes a campaign contribution is fully as First Amendment-intense as the private expenditure of funds. It verges on the arbitrary to draw a distinction of constitutional dimensions between Congress' ability to regulate contributions and expenditures based on an alleged difference in the relative intensity of the communicative experience. Thus, *amicus* believes that the justification for regulating campaign con-

ditures by PAC's); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (invalidating ban on corporate campaign expenditures by non-profit corporation "akin to [a] voluntary political association").

tributions is not their lesser First Amendment status, but the existence of a compelling interest in preventing the reality or appearance of improper *quid pro quo* relationships.

Similarly, after twenty years of experience, the assertion in *Buckley* that contributions pose a significant risk of *quid pro quo* corruption, while independent expenditures, no matter how large, or how perceived, pose no real or apparent danger of *quid pro quo* corruption, seems naive. When an extremely wealthy "supporter" publicly expends immense resources on behalf of a candidate, the perception and reality is that the candidate is as publicly beholden to the donor as if the money had flowed as a direct contribution. While relatively small independent expenditures pose only a minor risk of undue influence (as do relatively small direct contributions), when the amounts reach significant proportions, twenty years of experience with PAC's and large independent donors reveals that the perceived potential for corruption and undue influence is fully present when independent expenditures become a significant component of a candidate's financial armory.

Moreover, the assertion in *Buckley* that all expenditures, no matter how large, are fully - and equally - protected at every dollar level appears to have been abandoned by the Court in the context of corporate expenditures. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). In *Austin*, the Court upheld a Michigan ban on independent expenditures by corporations in state and local elections, noting that large aggregations of corporate wealth capable of influencing elections are the result of economic transactions bearing no relationship to politics. If, under *Austin*, elections can be insulated against an avalanche of corporate wealth accumulated in non-political contexts, it is unclear why huge concentrations of wealth accumulated in equally non-political contexts by partnerships, trusts and individuals cannot be similarly subjected to regulation to prevent the unfair skewing of the electoral process in favor of the rich. In short, once the non-political genesis of large aggregations of wealth becomes

a criteria for regulation, *amicus* does not believe that the Court can draw a principled constitutional line at the corporate form.

Finally, the conventional *Buckley* analysis has led to several unfortunate practical results. It has demonstrably magnified the importance of personal wealth. Recent experience indicates that extremely wealthy candidates enjoy an artificial electoral advantage under *Buckley*, since they are freed from contribution regulations, while remaining free to expend immense personal wealth that is unavailable to other candidates.[15] It has also magnified the role and influence of special interest contributors organized as PAC's. Most unfortunately, the *Buckley* analysis, by exempting expenditures from regulation, has inadvertently increased the fund-raising pressures on already vulnerable candidates by limiting the money supply, while doing nothing about the demand. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 Colum. L. Rev. 1281 (1994).

In economic terms, *Buckley* restricts the money supply by appropriately restricting contributions that risk "corruption", but does nothing to limit the demand for money, since expenditures are constitutionally insulated from regulation. The result is a Madisonian nightmare, with candidates forced into a never-ending courtship of prospective donors who openly contribute on the basis of economic self-interest, creating the worst possible climate of actual and perceived undue influence.

Perhaps the most troubling result of *Buckley* has been the erosion of faith in the moral integrity of the democratic process. Contrary to the stated assumption of *Buckley* that unregulated expenditures would not lead to a widespread appearance of "corruption", voters lacking the financial abil-

[15] In the context of the 1996 Presidential campaign, Steve Forbes has candidly conceded that, but for the restrictions imposed by federal law, he would have underwritten the campaign of Jack Kemp.

ity to buy a candidate's attention or loyalty perceive themselves as powerless and betrayed. No decision of government is viewed with trust, since every decision is permeated by the appearance, if not the reality, of undue influence.

C. Enriching the *Buckley* Analysis

In order to shore up *Buckley*'s analytic framework, and to correct its unfortunate practical consequences, *amicus* urges the Court: (1) to re-assess in the light of experience the relationship between unregulated campaign expenditures and the loss of confidence in the democratic process; and (2) to add a third governmental interest to the corruption and equality concerns considered in *Buckley*—a compelling societal interest in defending an elected official's capacity to make decisions that are, and are perceived to be, the result of principled judgment, and not merely an effort to please an influential constituent.

Elected officials play two crucial roles in the American democratic experiment. On the one hand, we expect them to function as faithful agents, anxious to learn constituent preferences, and to respond to them. In one sense, the requirement that candidates raise money from the electorate in order to contest an election is some guaranty that an elected official will be a faithful and attentive agent of her constituents. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994). Such an argument assumes, of course, that all constituents have a fair opportunity to "monitor" their representatives by imposing financial pressure on them. In the real world, the economic monitoring function excludes the poor and much of the middle class, leaving the economic monitoring pressures to the wealthy, and to organized special interests. The inherent inequality of using money as the principal method of monitoring elected representative has led to calls for public funding of elections, and underlies the Circuit's perceptive recognition that concerns over equality should play a greater role in our thinking about campaign financing. Jamin Raskin

and John Bonifaz, *The Constitutionality Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160 (1994); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 Colum. L. Rev. 1204 (1994).

On the other hand, we ask elected representatives to rise above self-interested agency status on occasion and to function as fiduciaries in search of the common good. See generally, Edmund Burke, *Address to the Electors of Bristol* (1774) (reprinted in Conor Cruise O'Brien, *The Great Melody* (1992) at 74-75; Abraham Lincoln, in the *Lincoln-Douglas Debates* (1854), described in David Herbert Donald, *Lincoln*, at 173-178. See also *Federalist* 10 (Madison).

Unfortunately, the *Buckley* Court's analysis has led to the glorification of the money-driven agency model, and the weakening - perhaps the extinction - of the fiduciary model. No more compelling interest exists in American life, amicus suggests, than the re-awakening of the fiduciary model of representative democracy. Legislation designed to permit elected representatives to find an occasional respite from the viselike pressure imposed by a relentless need to please self-interested donors would restore the reality and perception of an independent, conscientious search for the common good. The genius - and challenge - of our democratic institutions has been to demand both agency and fiduciary behavior from our elected representatives, often at the same time. But *Buckley*, with its singleminded emphasis on regulating contributions but not expenditures, makes it almost impossible for the fiduciary model to flourish, while significantly advantaging the agency model.

Discussion of democratic theory in the United States revolves around two models: public choice and public interest.[16] The public choice model argues that the process of leg-

[16] For a description of the public interest model, see Posner, *Theories of Economic Regulation*, 5 Bell J. Econ & Mgmt Sci. 335, 36

islation is driven exclusively by selfish efforts to maximize individual self-interest. Legislation, according to many public choice theoreticians, is simply the outcome of an auction among interested persons seeking to maximize short-term economic advantage. Altruism is non-existent; claims to seek the common good are either cynical strategies, or incoherent acts of self-delusion. Under public choice, the legislative process is reconceived as a market, with legislators acting as the sellers of a product paid for in votes, campaign contributions, honoraria and free vacations. The buyers are economic interest groups seeking wealth transfers. Sadly, *Buckley* is a roadmap to a public choice world.

The competing model, public interest, flows from James Madison's Federalist No. 10, where Madison warns against "factions" and envisions the growth of a pluralist polity in which self-interested actors are occasionally persuaded to agitate and legislate for the common good.[17] Public interest theory, associated in recent years with the revival of civic republicanism,[18] argues that an optimum solution to many problems can be found that will benefit everyone, if only some of us can be persuaded to trade short-term economic advantage for long-term collective good. Altruism plays an important role; arguments about the common good take center stage, and play an important (not merely a cosmetic) role in the legislative process. Under a public interest model, the democratic process is conceived as an exercise in remedying

(1974). It is described in Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. Pa. L. Rev. 1, 31-50 (1990).

For examples of public choice analysis, see, e.g. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation*, 76 Va. L. Rev. 265 (1990). It is described in Shaviro, *supra*, at 64-71.

[17] See Kelman, *Why Public Ideas Matter* in *The Power of Public Ideas* (R. Reich, ed. 1988); Sunstein, *Interest Groups in American Law*, 38 Stan. L. Rev. 29 (1985)

[18] See Sunstein, *Beyond the Republican Revival*, 97 Yale L. J. 1539 (1988).

market failure, with individual acts of selfishness viewed as part of a "prisoner's dilemma" to be redeemed by collective acts in furtherance of the common good.

Both public choice and public interest make claims to be *the* way of analyzing the democratic process, both descriptively and normatively. *Amicus* believes that each has important kernels of insight. Public choice reminds us of the undeniable role that self-interest plays in the democratic process; public interest calls us to rise above parochialism in search of common goals. Ideally, we should structure the democratic process to get the best of both worlds by encouraging self-interested players to make their wishes - and their influence - known to legislators, while assuring that legislators remain capable, on occasion, of living up to Madison's ideal of a search for the common good. Unfortunately, the conventional reading of *Buckley* locks our political system into a public choice model, while making it almost impossible for a public interest perspective to flourish. The Court should recognize that a compelling governmental interest exists in fostering both the reality, and the perception, of the capacity of elected representatives to make principled choices driven by a belief in the common good in order to permit both models to function with the necessary vigor.

CONCLUSION

For the above-stated reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Alternatively, the Court may wish to remand for the development of a fuller evidentiary record on the role of Section 441a(d) as a brake on the influence of soft money donors on federal elections, and the continuing viability of the factual assumptions underlying *Buckley v. Valeo*.

Dated: March 15, 1996
New York, New York

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No. 95-489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as Treasurer,

Petitioners,

—v.—

FEDERAL ELECTION COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE BRENNAN CENTER FOR JUSTICE TO ENLARGE TIME TO FILE AMICUS CURIAE BRIEF

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE BRENNAN CENTER FOR JUSTICE TO ENLARGE TIME TO FILE AMICUS CURIAE BRIEF

1. The Brennan Center for Justice requested and obtained consent from each of the parties in the above-captioned case to file an *amicus curiae* brief in support of Respondent.

2. When I asked the deadline for filing, I was told that the Court had set the deadline at Friday, March 15, 1996. I was aware that the Court had set an expedited briefing schedule. I was, however, unaware that the Court had suspended Rule 29.2, which permits the filing of papers by mail on the date of the deadline, and had set a firm requirement that the papers be received by 3:00 p.m. on March 15.

3. The Brennan Center's *amicus curiae* brief was filed on March 15, by express mail. The Clerk's Office has informed us that the brief was received on March 18.

4. I learned today from the Clerk's Office that the brief has been deemed untimely filed because the Court's order setting an expedited deadline had suspended the operation of Rule 29.2.

For the foregoing reasons, the Brennan Center for Justice respectfully requests that the Court enlarge the time for the filing of its *amicus curiae* brief and deem the brief timely filed.

Dated: March 21, 1996
New York, New York

Respectfully submitted,

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Supreme Court, U.S.
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Colorado Republican Federal Campaign Committee and Douglas L. Jones, as Treasurer,

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Federal Election Commission,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICI CURIAE COMMON CAUSE AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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March 15, 1996

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BRIEF OF AMICI CURIAE COMMON CAUSE AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

Common Cause is a nonprofit membership organization with approximately 240,000 dues-paying members nationwide. Common Cause promotes, on a non-partisan basis, its members' interest in open, honest, and accountable government and political representation. Common Cause

seeks to achieve this objective by making government more responsive to citizens through government and election reform. Common Cause has participated in litigation seeking to protect the integrity of the electoral process. It has filed briefs as a party or *amicus curiae* in numerous Supreme Court and lower court cases concerning the constitutionality and implementation of federal and state election laws.

Public Citizen is a non-profit organization with approximately 100,000 members throughout the United States. For more than 24 years, it has actively worked in the courts and Congress to eliminate corruption and the excessive influence of large contributors in federal elections. Public Citizen firmly supports the values embodied in the First Amendment, in the election context and elsewhere, but believes that the application proposed by petitioners and their *amici* would open a gaping hole in the current system by allowing large contributors to funnel their donations through the political parties, thereby circumventing the existing limits on individual contributions.

To date, the respondent Federal Election Commission ("FEC") has defended the statute at issue on other grounds than those urged in this brief, and therefore, without this submission, the Court may not fully appreciate what is at stake in this case. Letters from counsel for each of the parties consenting to the filing of this brief have been submitted to the Clerk of the Court.

STATEMENT OF THE CASE

The Statute

This case raises issues regarding the interpretation and constitutionality of a provision of the Federal Election Campaign Act ("FECA") that limits the amount that politi-

cal parties and their committees may spend for and on behalf of the party's candidates in connection with a federal election. 2 U.S.C. §§ 441a(d)(1) and (3). The statute at issue imposes a uniform limit with respect to House races of $10,000, indexed for inflation. 2 U.S.C. § 441a(d)(3)(B). In 1994, this limit was $29,300. FEC Record (Mar. 1994). The limits for party spending in Senate elections are based on a formula using the voting age population in each state, and for the 1994 elections ranged from $58,600 to $1,325,415. 2 U.S.C. § 441a(d)(3)(A); FEC Record (Mar. 1994). The statute caps the amount that a national party committee and the relevant state party committee may each spend in connection with specific elections. Typically, the state party committees assign their spending authority to a national party committee such as amicus Democratic Senatorial Campaign Committee ("DSCC"), which is comprised of sitting Senators.

Section 441a(d) is part of an integrated statutory framework which Congress enacted in 1974 to combat corruption. Section 441a(d) works in tandem with two other FECA provisions that cap the amount individuals may give directly to candidates' campaigns and to political party committees. Section 441a(a)(1)(A) limits the amount individuals may give to a candidate's campaign to $1,000 for the primary election and $1,000 for the general election (effectively, a $2,000 limit per election cycle). Section 441a(a)(1)(B) imposes a much higher limit of $20,000 per calendar year on contributions by individuals to national political party committees.

Political parties and party candidates are engaged in a joint electoral venture. The party nominates and seeks to elect its candidates; the candidate runs for election on behalf of the party. If there were no limit on the amount political party committees could spend on behalf of the

party's candidate, then the political party committee could effectively flow through to a candidate's campaign all $20,000 of an individual's $20,000 contribution to the party committee. If that were permitted, then the Section 441a(a)(1)(A) cap on individual contributions to candidates would become at least $22,000 rather than $2,000. To avoid this problem, Section 441a(d) limits this flow-through by largely uncoupling the candidate from the contributor's money. This provision is necessary to preserve the efficacy of the Section 441a(a)(1)(A) $1,000 per election contribution limit where two groups — the candidate's campaign organization and the party committee — engage in a joint venture to elect the candidate, but one entity, the party committee, is entitled to receive far larger contributions than the other. The provision is also needed to preserve the efficacy of the presidential campaign finance system. *See infra* n. 27.

Section 441a(d) limits "expenditures in connection with" federal elections. The FECA provides, logically enough, that direct spending by a person that is not wholly independent of the candidate who benefits from the spending must be considered a "contribution" to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i). If someone agrees to pay a candidate's car rental bills by writing checks directly to the rental company, that "expenditure" is deemed a "contribution" by the person to the candidate. FEC regulations correctly provide that, in the case of party committee spending, all spending in connection with a federal election must be deemed a "contribution" to the party's candidate because the party and its candidate are engaged in a joint venture to elect the candidate; in this context, the concept of an "independent expenditure" by the party committee is an oxymoron. 11 C.F.R. § 110.7(b)(4). For these reasons, the

limits imposed by Section 441a(d) are treated as contribution limits, even though the statute is phrased in terms of "expenditures."[1]

Facts of this Case

This case arose when the Colorado Republican Party paid for an advertisement accusing then Congressman Tim Wirth of distorting his record. Congressman Wirth had formally declared his intention to run in the election for the Senate seat from Colorado. Although the Republicans had not yet named their candidate, their advertisement mentioned Wirth and the upcoming Senate race in a context in which it was clear that they opposed Wirth's candidacy.

Respondent filed suit on the ground that the anti-Wirth advertisement was an "expenditure" by the Colorado Republican Party "in connection with" the pending Senate race and that, together with the expenditures made by the National Republican Party in that race, exceeded the limits allowed by Section 441a(d). Petitioners claimed that the advertisement was not "express advocacy" and hence was not covered by the statute, and that if it was, the limits on aggregate spending by a political party on behalf of one of its own candidates violated the First Amendment.

The district court agreed with petitioners that Section 441a(d) only covered express advocacy and that this advertisement was not express enough. On that basis it did not reach the constitutional claim. The Tenth Circuit reversed, finding that an advertisement by a political party, attacking a named and declared candidate of the opposing party in an election context, was an "expenditure in connection with a

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[1] Other FECA provisions cap direct party committee contributions to candidates. *See* 2 U.S.C. §§ 441a(h) and 441a(a)(2)(A).

federal election" and thus subject to the limit in Section 441a(d), which it upheld against a First Amendment challenge.

SUMMARY OF ARGUMENT

Election campaigns are joint ventures between political party committees and the candidates they nominate and support. Political party committees do not, therefore, insulate party candidates from the corrosive influence of large contributions that special interests give to party committees. In fact, special interest contributors seek and obtain influence with officeholders and candidates by giving large sums to their parties.

By limiting the amount of money that parties may effectively pass through to candidates, Section 441a(d) combats such actual and apparent corruption in two ways. First, it prevents evasion of the FECA's limit on the amount individuals may contribute directly to a candidate — $1,000 for the primary and $1,000 for the general election. Political party committees may receive contributions as large as $20,000 annually from individuals. Absent Section 441a(d), political party committees could effectively pass these large amounts to party candidates, thereby undermining the effectiveness of the $1,000 per election limit on direct contributions. Second, Section 441a(d) curtails the ability of private donors to extract quid pro quo arrangements from candidates based on large contributions to the party that the candidate may have solicited.

Section 441a(d) does not violate the First Amendment because, as a measure to prevent evasion of other FECA provisions whose compelling purpose has been sustained, and as a direct anti-corruption measure, it advances compelling governmental needs and is reasonably designed to accomplish its purpose. *Buckley v. Valeo*, 424 U.S. 1 (1976). This Court has often sustained election law limits

that serve such purposes. *Buckley*, *supra*; *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). There has been no showing that Section 441a(d) curtails the amount of speech that joint party-candidate campaigns may sponsor; to the contrary, the amounts spent on Senate and House elections continue to skyrocket. In these circumstances, the Court should defer to Congress's judgment "as to the need for prophylactic measures where corruption is the evil feared." *FEC v. National Right To Work Comm.*, 459 U.S. 197, 210 (1982).

Section 441a(d) could not accomplish its anti-corruption function if it were construed to apply only to "express advocacy" communications. Any such limit would open a major loophole in that provision. There is no constitutional need to limit Section 441a(d) to express advocacy, because the situation presented here is altogether different from those where the Court felt constrained to construe the phrase "expenditure in connection with" a federal election to apply only to express advocacy. Those situations involved independent expression by individuals and groups who were unaffiliated with campaigns; by contrast, Section 441a(d) applies only to party committees, whose activities are not independent of candidate campaigns and which are "by definition, campaign related." *See Buckley*, 424 U.S. at 79. Construing Section 441a(d) to cover the kind of contest-specific electioneering message that is at issue in this case would still leave ample room for parties to make unrestricted expenditures to express opinions that neither mention candidates nor elections.

ARGUMENT

Petitioners' attack on the constitutionality of Section 441a(d) hinges on the proposition that Section 441a(d) performs no useful, constitutionally permissible, anti-cor-

ruption function that party committees themselves do not already perform. As a factual predicate for this proposition, petitioners and their amici portray party committees as cleansing filters that stand between potentially corrupt private money and potentially corruptible candidates, whom they somehow view as independent from the party. But these contentions are erroneous, and should not serve as a predicate for decision.

The parties and their candidates are not strangers. Party candidates are first and foremost party members — indeed, they are usually party leaders.[2] They operate inside, not outside, their party. They are creatures of their parties and their party's lifeblood as well. The parties exist principally to elect candidates who will, when in office, espouse party positions.[3] Election campaigns are joint ventures between party committees and their candidates, who appear on the ballot as party representatives.

Congress recognized the symbiotic relationship between a party and its candidates in the FECA and related statutes. In Section 431(16) of the FECA, Congress defined the term "political party" as an "organization which nominates

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[2] *See* William J. Keefe, *Parties, Politics, and Public Policy in America* 45 (1988) (in many state and local party organizations, there is "a concentration of power in the hands of public officeholders and candidates for public office . . . In most jurisdictions the officeholders or aspirants . . . carry the party banner.").

[3] Amici Committee for Party Renewal, et al. describe as "one of the traditional and most fundamental activities of political parties: providing financial and material support to candidates." Brief of Amici Committee for Party Renewal, et. al, at 5. The Charter of the Democratic Party states its fundamental goals as including nominating and assisting in the election of Democratic candidates for President and "assisting state and local Democratic Party organizations in the election of their candidates." Charter of the Democratic Party, Art. I.

a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such . . . organization." 2 U.S.C. § 431(16). Under the statute, then, what defines a political party is the nomination and support of candidates who run under its name. In the same fashion, Congress defined the word "candidate" in the related Presidential Election Campaign Fund Act as "an individual who (A) has been nominated . . . by a major party, or (B) has qualified to have his name on the election ballot . . . as the candidate of a political party. . . ." 26 U.S.C. § 9002(2).[4]

I. Section 441a(d) Is an Important Cog in the FECA's Anti-Corruption Machinery

Section 441a(d) combats actual and apparent corruption by limiting the potential for private money to be funnelled to party candidates through their own parties. It does so first and foremost by preventing evasion of the limits, sustained in *Buckley*, 424 U.S. at 26-35, on direct private contributions to candidates. And, by placing effective limits on the parties' ability to pass large corrupting contributions through to candidates, Section 441a(d) curtails the ability of private donors to extract quid pro quos from a candidate by contributing to the candidate's party and, concomitantly, it dispels the corrosive appearance that large party donations buy candidate fealty. *See, e.g., id.* at 26-27.

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[4] *See also* 26 U.S.C. § 527(e)(1) & (2) which, for tax purposes, defines a "political organization" as a "party" operated primarily for the purpose of nominating and electing candidates.

A. *Section 441a(d) Preve*[ts Evasion of the Consti-
tutional Limits on Di[ect Private Contributions
to Candidates

Section 441a(d)'s limit on the amount party committees may spend on behalf of their ov[n members who run for office is an important part of Con[gress' integrated statutory attack on corruption. It supports another key FECA com-ponent, the $2,000 aggregate limi[on what individuals may contribute to candidates in their [rimary and general elec-tion campaigns. 2 U.S.C § 44[1a(a)(1)(A). The Court sustained this candidate limit in *Bi*[*ckley*, holding that

> [i]t is unnecessary to look [eyond the Act's primary purpose — to limit the act[uality and appearance of corruption resulting from [arge individual financial contributions — in order [o find a constitutionally sufficient justification for [the $1,000 contribution limitation.

424 U.S. at 26. Section 441[a(d) also works in tandem with, and is particularly n[ecessary because of, Section 441a(a)(1)(B), which per[mits individuals to make much larger contributions to [the national party committees — up to $20,000 annually [— $40,000 per two-year election cycle — to party commi[ttees.[5]

Section 44[1a(d) helps prevent evasion of Section 441a(a)'s co[ntribution limits. If there were no limit on the amount [parties could spend on behalf of their members who r[un] for office, those candidates would have an unlim-ited [in]centive to advise contributors who had already given [the] statutory maximum to the candidate to give an addition-

[5] An individual may give up to $20,000 per year to the national party committees. 2 U.S.C. §441a(a)(1)(B). This allows donations of $40,000 during the two-year election cycle for the House, and $120,000 during the six-year election cycle for the Senate.

al $40,000 over the course of two years (or $120,000 over six years for Senators) to the party's committee, which could use the money to support that candidate's campaign. Equally, contributors who wished to contribute more than $2,000 to a party's candidate would have compelling, but suspect, incentives to give money to the party. The result would be a candidate who was beholden to the contributor not merely for the $2,000 in contributions permitted by Section 441a(a), but for up to $42,000 in contributions used to support the candidate, in the case of House Members, and up to $122,000 in the case of Senators. That result would constitute a gross evasion of the $2,000 aggregate limit on direct contributions to candidates, and would permit effective contributions that far exceed the amount Congress deemed appropriate.

The practice whereby candidates ask special interest donors who have "maxed-out" on contributions they may legally give the candidate to give additional sums to the candidate's party, with the understanding that the party will spend the funds on behalf of the candidate exists now, within the limits of the present law. For example, one Senate candidate sent a fundraising letter saying: "For those of you who have already maxed out to my campaign, the DSCC tally is an avenue through which you can offer more support." *See* Conciliation Agreement ¶ 15(a) at 4, FEC Matter Under Review (MUR) 3620. The DSCC "tally" was a program in which candidates encouraged individuals to donate to the DSCC as a way of further supporting the candidate. *Id.* Without the limits placed on such uses of party money by Section 441a(d), this type of fundraising would overwhelm the per candidate contribution limits.

The FEC alleged that the tally practice was illegal, but only to the extent it involved actual promises by the DSCC to spend on behalf of the candidate the amount the candidate raised for the DSCC. *Id.* The FEC allowed the DSCC to continue the tally sheet program, and to tell contributors that it would consider spending an amount equivalent to the contribution on behalf of the candidate, as long as the DSCC clarified to contributors that it did not promise to do so. *Id.* Thus, candidates may raise funds for the party committees with the tacit understanding and expectation that the contributions will be passed through to the candidate.

To combat these problems, Congress enacted Section 441a(d) to cap the amount of financial support party committees may pass through to any one candidate. Because the statute permits the candidate's campaign organization and the party committee to engage in a joint venture to elect the candidate, and permits far larger contributions to the party committee than to the candidate, Section 441a(d) is necessary to preserve the efficacy of the $2,000 per election cycle aggregate contribution limit. For these reasons, petitioners' assertion that the limit on contributions to parties is adequate to prevent use of the party as a conduit for corruption is inaccurate. Brief of Petitioners, at 30.

To be sure, Section 441a(d) does not go to the extreme that would be necessary to keep the $2,000 limit inviolate — banning all party activity on behalf of party candidates financed by contributions from individuals who have made contributions to the candidate. But Section 441a(d) does remove much of the incentive to circumvent the per-candidate contribution limit. The National Republican Party Committee could spend only about $154,000 in Colorado in 1994, FEC Record (Mar. 1994), which as a practical

matter effectively limits the number of large contributions that a party committee can pass through to a candidate. Congress struck a balance between the need to fund the political parties, the need to continue the historic system whereby candidates run as party candidates with party support, and the need to protect the per-candidate contribution limits. Section 441a(d) is the provision that mediates between these competing interests.[6]

Congress's decision to allow contributions of $20,000 to national party committees does not reflect a determination that large contributions to parties do not carry the seeds of corruption. When Congress struck a balance by allowing larger contributions to parties than to candidates, it did so as part of an integrated statute that included the provision petitioners now ask the Court to excise — Section 441a(d). But it is Section 441a(d) that uncouples the party's candidates from the large contributions that party committees receive from private donors — money that when given in large amounts carries with it, according to both Congress and this Court, the strong stench of actual and apparent corruption. Therefore, the only proper inference to draw from the relatively high cap Congress placed on contributions to party committees is that Congress made the judg-

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[6] As this Court has long recognized,

> [r]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

See Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (citations omitted). *See also Bowen v. Owens*, 476 U.S. 340, 347 (1986); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

ment that a high party contribution limit is proper only so long as Section 441a(d) limited the ability of party committees to pass that money through to candidates.[7]

B. *Section 441a(d) Also Curtails Actual and Apparent Corruption*

Petitioners assert that "parties represent an extraordinarily broad range of interests . . . [and] are not captive to narrow economic interests which are often viewed as corruptive." Brief of Petitioners, at 32. Similarly, Amici Committee for Party Renewal, et al. assert that "[p]arties are too large and too diverse to be controlled by any special interest." Brief of Amici Committee for Party Renewal et al., at 17.

These broad generalizations do not stand up to examination. In addition to their attempts to influence particular candidates through the largest lawful direct contributions, special interests make large contributions to parties to influence party candidates and officeholders. The way parties raise and spend money does not cleanse electoral politics of tainted money. Big money donations to political parties can and do create at least the appearance of corruption, as we now show.

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[7] *Cf. Gard v. Wisconsin State Election Bd.*, 156 Wis. 2d 28 (Wis.), *cert. denied*, 498 U.S. 982 (1980). In *Gard*, the Wisconsin Supreme Court sustained the constitutionality of a state statute that imposed an aggregate limit on the total contributions a candidate could receive from all political committees, including party committees, and held that the limit on contributions by party committees acts as a "buffer between the flow of money" from PACs to candidates. *Id.* at 61. For the same reasons, Section 441a(d) prevents evasion of Section 441a(a)'s $5,000 limit on contributions to candidates by PACs just as it prevents evasion of the $1,000 limit on individual contributions.

In 1995, after the Republican Party became the majority party in Congress, "soft money" contributions from the tobacco industry to the national Republican Party committees, including the congressional campaign committees, increased by more than four-fold over 1993, the previous off-election year, from $546,224 to $2,357,259.[8] That money appears to have bought influence. On March 1, 1996, the *Wall Street Journal* reported:

> GOP chief Haley Barbour last spring phoned Texas Gov. Bush's office to check on a bill to prevent cities from adopting strict smoking restrictions . . . . Tobacco-industry "soft money" donations to the GOP totaled almost $2.3 million last year.[9]

Earlier this year, the *Wall Street Journal* carried a comparably disturbing report showing the connection between tobacco industry interests and the activities of political parties to which they contributed heavily:

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[8] *See* Common Cause, *Smoke and Mirrors* (Mar. 1996). "Soft money" refers to money raised by the national political party committees and elected officials from sources, such as corporations and labor unions, and in amounts, often of $100,00 or more, that would not be legal if the activity were governed by the FECA. The money is spent by the political parties on activities which affect both federal and non-federal campaigns, such as get-out-the-vote drives and generic advertising.

In 1995, Democratic and Republican national party committees raised nearly $60 million in soft money contributions from corporations, labor unions and wealthy individuals, more than double the $28.4 million they raised in 1993, the previous off-election year. The Republican Party, which took control of Congress in 1994, more than tripled its soft money receipts, from $10.7 million in 1993 to $33.9 million in 1995. *See* Common Cause, *Soft Money Contributions to National Party Committees 1993 v. 1995* (Mar. 1996).

[9] *Tobacco Ties*, Wall St. J., Mar. 1, 1996, at A1.

> Republican National Committee Chairman Haley Barbour phoned the Arizona House speaker last spring to pressure him into supporting a pro-tobacco bill, the legislator said. . . . [T]he GOP has been relying increasingly on contributions from the tobacco industry.[10]

These instances are part of a long-standing pattern and practice that has involved both major parties:

- One of the Watergate investigations related to a concern that the ITT Corporation had received special treatment on antitrust matters from President Nixon's Justice Department by virtue of a large contribution, not to the candidate, but to the Republican Party to finance its convention. "[T]he evidence accumulated . . . showed that ITT had gained access, directly or indirectly, to important Administration officials who in some instances took some action relating to these cases," and in one instance this "high-level influence produce[d] a provable impact on the handling of the cases."[11]
- In 1995, the Republican National Committee sent a fundraising letter to potential donors that described the "benefits for each level of commitment" including, for a $250,000 contribution, both lunch with the Speaker of the House and the Senate Majority Leader

[10] Timothy Noah, *GOP's Chief Pushed Pro-Tobacco Bill At State Level, Arizona Lawmaker Says*, Wall St. J., Feb. 20, 1996, at A20.

[11] Watergate Special Prosecution Force Report 58 (Oct. 1975).

> and a "[p]rivate meeting with members of selected Senate and House of Representatives Committees."[12]

- The Democratic National Committee offered its own version of "benefits for each level of commitment"; the DNC's offer included, for a $100,000 contribution to the party, two meals with the President, two meals with the Vice President, an invitation to accompany party leaders on foreign trade missions, two "policy retreats" with Administration officials, and briefings by Administration officials.[13]
- Fruit of the Loom contributed $100,000 to the Republican National Committee soon after a Republican congressman had introduced a bill, favored by Fruit of the Loom, to relax export quotas and tariffs on Caribbean Basin countries.[14]

These examples refute the assertion that "an enlarged role for parties is probably the best way to check the growing influence of PAC money in congressional campaigns,"[15] at least in the absence of Section 441a(d).

The problem is compounded because many party leaders who raise large sums for their parties hold office themselves. The members of such national party committees as

[12] 1995 Fundraising Letter from Haley Barbour, Chairman of the Republican National Committee. *See* Jane Fritsch, *Republican Party Seeks a Fundraising Record*, N.Y. Times, Jan. 25, 1996, at A17.

[13] Lynn Sweet, *The President's Price List: Party Selling Package*, Chi. Sun-Times, June 30, 1995, at 1.

[14] R.H. Melton, *Corporate Contributions Pour Into the RNC*, Wash. Post, April 6, 1995, at A19.

[15] Brief of Amici Committee for Party Renewal, et al., at 18.

amicus DSCC are sitting Senators.[16] Contributions to the party committees in such circumstances at least appear to buy influence. For example, the Speaker of the House and the Senate Majority leader involved themselves in a Republican Party fundraising "gala" in February 1995. Their objective was to raise $10 million for the party from business executives and other large special interest donors. According to the *Wall Street Journal*, they told business-PAC leaders they could expect "*warm treatment* from a new GOP leadership team" if they stopped giving to Democrats and started giving to Republicans.[17]

Federal candidates directly benefit from contributions made by special interests to the parties, even when those contributions are ostensibly "soft money" donations that may not be used directly in connection with federal campaigns. As amicus Alexander has observed, "This use of soft money has . . . helped free up federally regulated dollars, to be used to make contributions or coordinated expenditures on behalf of party candidates, rather than to pay bills at the national headquarters."[18] In the 1994 campaign, the Republican National Committee's receipt of

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[16] All four of the party committees which engage in Section 441a(d) spending—the DSCC, the Democratic Congressional Campaign Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee—are composed exclusively of sitting Members of Congress. *See Congressional Yellow Book*, Winter 1996 at VI-10, 11, 24, 26.

[17] Jill Abramson & David Rogers, *Shifting Fortunes: As GOP Tries to Shrink Government, Coffers Swell With New Money*, Wall St. J., Feb. 9, 1995, at A1, A5 (emphasis added).

[18] Herbert E. Alexander & Anthony Corrado, *Financing the 1992 Election* 162 (1995).

large soft money donations from special interests and others enabled it to spend $5 million on House campaigns.[19] The House candidates who benefitted knew who the widely publicized large party donors were (after all, the donors receive private meetings with selected Senate and House Committee members) and are beholden to those donors precisely because those contributions enabled the party to spend so much more on their own campaigns. This problem would be exacerbated if the § 441a(d) limits were removed.

The foregoing is, we submit, more than enough to show that the factual premises that underlie petitioners' argument grossly understate the potential for corruption when parties and party members who run for office raise money from private sources for the party and spend that money on the candidates' campaigns. Special interests do make large contributions to parties to influence party candidates and officeholders. The call contributors have on a party's candidates would be even more compelling if there were no restriction on the amount the party could spend on those campaigns. In addition to buttressing other FECA provisions, Section 441a(d) directly addresses this kind of actual and apparent corruption by largely uncoupling the corrosive link between private money and federal candidates.

II. Section 441a(d) Does Not Violate the First Amendment

In *Buckley* the Court held that

> the primary interest served by . . . the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imag-

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[19] Charles R. Babcock, *Amway's $2.5 Million Gift to GOP the Largest Ever*, Wash. Post, Jan. 11, 1995, at A1.

> ined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.

424 U.S. at 25. The Court specifically recognized that "huge contributions to [a] candidate's political party" could be used to circumvent the contribution limits applicable to the candidate. *Id.* at 38.

That being so, § 441a(d) serves important governmental purposes, both as a measure to prevent evasion of other FECA provisions whose compelling purpose has been judicially sustained, and as a direct measure aimed at combatting corruption and its appearance. This Court's jurisprudence establishes that the kinds of anti-corruption goals served by Section 441a(d) advance compelling governmental needs and justify the imposition of the type of restriction at issue here. *Buckley*, 424 U.S. at 26-27; *California Medical Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981); *FEC v. National Right To Work Comm.*, 459 U.S. 197, 207-10, (1982); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-60 (1990). *California Medical Association*, *Austin*, and *Buckley*, in which the Court sustained campaign finance provisions which prevented evasion of other important provisions of an integrated statutory attack on corruption, are particularly instructive.

In *California Medical Association*, the provision at issue, 2 U.S.C. § 441a(a)(1)(C), was a $5,000 limit on contributions to multicandidate political committees such as PACs. Plaintiffs there argued that the provision did not combat corruption because contributions to PACs were not direct contributions to any candidate and thus, it was said, could not corrupt any candidate or officeholder. This argument strongly resembles petitioners' argument here that parties cannot corrupt candidates. The Court sustained

the measure, reasoning that it was integral to the effectiveness of the $1,000 limit on candidate contributions and the $25,000 annual aggregate limit on individual contributions:

> Since multicandidate political committees may contribute up to $5,000 per year to any candidate, . . . an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channelling funds through a multicandidate political committee . . . . [I]t is clear that this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*.

453 U.S. at 198-99.

Similarly, in *Austin*, the Court sustained a state ban on corporate independent expenditures, as it applied to a not-for-profit chamber of commerce, in part on the ground that the statute so applied prevented "[b]usiness corporations . . . [from] circumvent[ing] the Act's restriction by funneling money through the Chamber's general treasury." 494 U.S. at 664. Likewise, in *Buckley*, the Court sustained the constitutionality of the $25,000 annual aggregate limit on individual contributions because it served to prevent evasion of the $1,000 contribution limit. 424 U.S. at 38. These three cases reject petitioners' main argument here — that provisions that prevent the flow-through of large contributions to candidates and thus buttress the per-candidate limit are not justified anti-corruption measures.

There has been no showing on this record that, because of Section 441a(d), candidates have trouble accumulating sufficient funds with which to mount effective campaigns. It is undisputed that party candidates, in tandem with their parties, amass and spend enormous and ever greater amounts of money in their campaigns. Campaign spending by House and Senate candidates has increased from a total

of $99 million in the 1976 election cycle to over $615 million in the 1994 cycle.[20] Candidates in particular races have spent staggering sums — a record total of $44.3 million was spent by the Republican and Democratic candidates in the 1994 California Senate race, while a total of $26.5 million was spent in the Virginia Senate race that same year.[21] Also in 1992, Democrat Richard Gephardt spent over $3.3 million in a race with total spending of $3.7 million.[22] These statistics demonstrate that candidates, and their parties, have quite ample funds to broadcast their election messages.

Petitioners and their amici attempt to avoid this point by treating party candidates' campaign spending as an irrelevancy and by arguing that the 441a(d) limit on party spending for and on behalf of party candidates standing by itself is too low to pass constitutional muster. Congress was of the opposite understanding of whether candidate campaigns and party efforts to further such campaigns are properly treated as separate, and Congress plainly got things right. As shown above, the supposed firewall between party candidates and their parties that petitioners posit has no reality. The parties and their members who run for office are joint venturers in every relevant respect relating to elections.[23] This is not a case, therefore, where Section

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[20] Common Cause, *Study of Campaign Finance: Fundraising, PAC Giving and Expenditures 1976 through 1994* (Oct. 1995) (based on FEC reports).

[21] FEC, *1994 Congressional Fundraising Climbs to New High*, Apr. 28, 19[illegible]

[22] *Id.*

[23] As Amici Committee for Party Renewal et al. state: "The party and the candidate clearly share a common interest in the candidate (continued...)

441a(d) as a practical matter "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19.

Just as there has been no showing that Section 441a(d) constrains spending on campaigns, there has been no showing that Section 441a(d) has or would constrain non-electioneering speech by political party committees. As discussed in Part III, Section 441a(d) leaves ample room for political party committees to express their views on issues important to their constituents, as long as those messages steer clear of the kind of contest-specific electioneering content that pervaded the advertisement at issue here.

Petitioners make much of the argument that Section 441a(d) restricts party committees to a greater extent than the FECA restricts PAC spending. But the comparison is one of apples to oranges. A PAC may make unlimited expenditures to support a candidate only if the PAC is not affiliated with and is entirely independent from the candidate. When a PAC's spending is not independent, its expenditures are treated as contributions under the FECA, 2 U.S.C. § 441a(a)(7)(C), and are subject to the FECA's $5,000 limit on contributions by PACs, 2 U.S.C. § 441a(a)(2)(A). Following the same logic, Section 441a(d) controls party committee expenditures as if they were contributions because they are not made independently of the party member, whom the party has selected to run for

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[23] (...continued)
winning the election, and they presumably share a common interest as well on at least major questions of public policy." Brief of Amici Committee for Party Renewal, et al., at 18.

office and who makes that race for and on behalf of the party as the party's candidate.

On these bases, Section 441a(d) does not violate the First Amendment, regardless of the outcome of the debate as to whether "strict scrutiny" should apply.[24] The provision serves as an integral part of a statute whose purpose is to prevent corruption, and it is designed as a buttress to other provisions and on its own terms, to achieve that objective. In *National Right To Work*, this Court held that "it is the potential for such [improper] influence that demands regulation," 459 U.S. at 210, and the Court gave considerable deference to Congress' judgment in this arena: "[n]or will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* Section 441a(d) is just such a prophylactic measure, and we respectfully urge the Court to defer to Congress' judgment and reject petitioners' constitutional attack.

III. Section 441a(d) Could Not Accomplish Its Important Anti-Corruption Function If Its Application Were Restricted to "Express Advocacy"

Petitioners ask this Court to narrow Section 441a(d) to apply solely to expenditures that qualify as "express advocacy" under standards developed in other FECA contexts. If this Court agreed, it would open a major loophole in Section 441a(d). Party committees would be free to pay for unlimited amounts of electioneering messages — including massive amounts of negative, attack advertising naming a candidate — as long as they were careful to avoid use of certain phrases like "vote for" or "vote

[24] For the reasons stated by respondent, this case should be treated as one involving a challenge to the constitutionality of a provision that limits contributions rather than expenditures.

against." As we now show, none of the reasons for importing an express advocacy requirement in other contexts applies here.

In other contexts, this Court and lower courts have held that particular provisions of the FECA cover only expenditures that are "express advocacy" — utterances that clearly advocate the election or defeat of a clearly identified candidate, using words such as "vote for" or "vote against." *See, e.g., Buckley*, 424 U.S. at 42, 44 n.52, 80; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980). In those cases, the courts examined restrictions on what individuals or groups who were not political parties could spend in connection with federal elections. The conclusion that drove the results was that, since these individuals and groups did not exist solely or even primarily to cultivate, nominate, and support candidates, they likely would have much to say on many subjects, including the election of candidates; that it is not the FECA's purpose to restrict or chill their speech on issues that is not candidate-related; and that any such restrictions that dampened their issue-related speech raised First Amendment concerns. Given that concern, the Court concluded that it was necessary, first, to narrow the apparently broad facial scope of the statute, and, second, to do so with a bright-line test that gave the maximum amount of freedom to borderline expressions. The Court adopted the "express advocacy" test to achieve this result.

The salient difference here is that Section 441a(d) applies only to political party committees. Unlike individuals and ad hoc or established nonparty groups, party committees focus their energies on selecting candidates from among their membership and supporting those candidates.

It would be inane to suggest that a candidate's own spending would not be an "expenditure" if he or she did not say "vote for me" or "vote against my opponent," because it can be and is safely presumed, without risk to First Amendment values, that a candidate's campaign spending is "in connection with" his or her election even without such express exhortations. This is just as true for party electioneering messages, because a campaign is a joint venture between the candidate and his or her party.

Another difference between this case and those that adopted an "express advocacy" gloss on the term "expenditure" is that, in the latter, the courts dealt with the highly protected area of independent expenditures — paradigmatically, individual citizens communicating their views in the absence of any coordination or affiliation with a candidate. That is not the situation here. As the FEC has reasonably concluded, the notion of a party electioneering expenditure that is independent of the campaign of the candidate whom the party selected and supports does not accord with common sense or reality.[25]

Indeed, *Buckley* interpreted the term "expenditure" differently for political committees, such as party committees, whose sole or major purpose is to elect candidates. The Court explicitly excepted political committees from the "express advocacy" requirement, and concluded that expenditures by political committees "can be assumed to fall within the core area sought to be addressed by Congress. They are, *by definition, campaign related*." *Id.* at 79 (emphasis added). Thus, the express advocacy test is not necessary to safeguard speech by an organization, such as a party committee, whose activities are, "by definition," campaign related.

[25] 11 C.F.R. § 110.7(b)(4). It is true that before a party nominates a candidate, there is no candidate with whom the party can coordinate its expenditures. But that does not mean that the party's expenditures are "independent"; all the potential candidates are members of the party making the expenditure and the opposition is the other party and any of its would-be nominees. Coordination is relevant only because, where it exists between an outsider and a campaign or party, it indicates the absence of complete independence. Evidence of coordination is not necessary in the case of a political party whose membership includes its potential candidates and whose major purpose is to select and support those candidates, because they are engaged in a joint venture from the outset.

In these circumstances, a definition of the term "expenditure" that is broader than "express advocacy" is unlikely to chill political expression by parties. The parties will speak. Nothing in the record suggests otherwise. Party committees have the professional know-how easily to distinguish between electioneering messages, which Section 441a(d) must be construed to cover, and pure issue speech which Section 441a(d) does not limit.

The advertisement at issue here falls quite easily into the category of electioneering that Section 441a(d) covers.[26] The target of the ad, then Congressman Wirth, was a Democrat who had already declared his intention to run for the Senate. The Republican Party ad attacked Wirth and explicitly related its attack to the upcoming election. If Section 441a(d) is construed to cover such contest-specific

[26] Indeed, the case can be made that the advertisement constitutes express advocacy even though it does not include magic words like "vote for" or "vote against." *See, e.g., FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) (speech need not include words listed in *Buckley* to be express advocacy, but must "be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.").

expressions it still leaves ample room for expressions of opinion by parties that neither mention candidates nor elections.[27]

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[27] A decision concerning the scope or constitutionality of Section 441a(d)(1) & (3) could impact on Section 441a(d)(2), which is not at issue here. Section 441a(d)(2) limits the amount national political party committees may spend in connection with presidential general elections. This cap works in tandem with the Presidential Election Campaign Fund Act, which provides optional public financing for candidates who agree to abide by specified spending limits. 26 U.S.C. § 9003(b)(1). This undertaking does not apply to the candidate's party, whose spending is capped by Section 441a(d)(2). If the scope or constitutionality of Section 441a(d)(2) were to come under question, that could gravely undermine the efficacy of the Fund Act, because presidential candidates would once again have enormous incentives to raise large contributions for their parties, and the parties could then spend in unlimited amounts on their campaigns, undermining the efficacy of the spending limits approved by this Court.

Conclusion

For these reasons and those stated by the respondents, we respectfully urge the Court to affirm the judgment of the United States Court of Appeals for the Tenth Circuit.

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No. 95-489

In the

Supreme Court of the United States

October Term, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS L. JONES, AS TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Certiorari to the
United States Court of Appeals
For the Tenth Circuit

BRIEF OF THE STATES OF KENTUCKY, CONNECTICUT, MINNESOTA, NEW MEXICO, OKLAHOMA AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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FEDERAL ELECTION COMMISSION,
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On Certiorari to the
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For the Tenth Circuit

BRIEF OF THE STATES OF KENTUCKY, CONNECTICUT, MINNESOTA, NEW MEXICO, OKLAHOMA AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Amici are States which limit the amounts political parties can expend on inherently coordinated expenditures which expressly advocate the election or defeat of a

clearly identified candidate. These States' statutes permit unlimited spending for issue advocacy by political parties, and unlimited independent expenditures by individual members of political parties. However, inherently coordinated expenditures by a party to elect its nominee or defeat the nominee's opponent are regulated as contributions in order to prevent circumvention of the limits upon contributions to candidates.[1]

The Colorado Republican Federal Campaign Committee's ("CRC") argument that political party expenditures must be equated with truly independent expenditures, if adopted by this Court, would eviscerate these States' statutes, especially those states with public financing of some elections.[2]

Public financing was enacted because it provides the only vehicle under prevailing case law for limiting a candidate's aggregate expenditures.[3] Candidates accept the voluntary expenditure limits in exchange for partial public financing of their campaigns.[4] Allowing the candidate's

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[1]Twenty four States have enacted statutes limiting such expenditures by political parties. *See* Appendix A, *infra*. *See, e.g.*, Ky. Rev. Stat. §121A.050(1); Conn. Gen. Stat. §9-333t.

[2]Nine States have enacted public financing for some elections. *See* Exhibit B, *infra*.

[3]*Buckley v. Valeo*, 424 U.S. 1, 57 n. 65 (1976); *Republican Nat'l Comm. v. F.E.C.*, 487 F.Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd.*, 445 U.S. 955 (1980).

[4]*See e.g., Vote Choice, Inc. v DeStefano*, 4 F3d 26 (1st Cir. 1993). *See also* footnote 43, *infra*.

party to make unlimited expenditures advocating the candidate's election or the opponent's defeat would eviscerate the spending limits that are the heart of public financing systems.[5]

CRC asks the Court to equate the inherently coordinated spending by political parties with the truly independent expenditures this Court has held may not be capped. However, *Buckley v. Valeo* squarely held coordinated expenditures may be regulated to prevent evasion of contribution limitations. This Court should not retreat from that holding.[6]

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[5]Because the State contribution limits apply only to those party expenditures that expressly advocate the election or defeat of a clearly identified candidate which are made in cooperation or consultation with the candidate or with the candidate's consent, Amici do not address CRC's argument that §441a(d)'s expenditure limitations unconstitutionally encompass any "electioneering message."

Amici also do not address the question whether the specific limits are "too low", *see* Brief For Petitioners at 23, as that question does not relate to the constitutional validity of equating coordinated expenditures made by a political party with contributions to the candidate. Moreover, the question whether the contribution limits are unconstitutionally low would be better answered by granting the writ in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3561 (U.S. 2/7/96) (No. 95-128), currently pending before this Court on petition for writ of certiorari to the Eighth Circuit.

[6]424 U.S. at 35-37, 46, 46 n. 3, 78-79 ("...controlled or coordinated expenditures are treated as contributions rather than expenditures...").

SUMMARY OF ARGUMENT

CRC's principal attack upon the constitutionality of §441a(d) equates party expenditures with independent expenditures. Party expenditures are not, however, independent. They are inherently coordinated with the party's nominee.[7]

Contributions are not limited to gifts of money. Otherwise, contribution limitations could be easily evaded. Consequently, campaign finance regulations routinely define "contribution" to include expenditures by individuals, committees and parties that are not truly independent, but are coordinated with candidates' campaigns.[8]

Regulating inherently coordinated party expenditures as contributions serves the compelling state interest identified in *Buckley*, and is narrowly tailored to advance that interest. The compelling state interest recognized by this Court is not limited to preventing bribery of the candidate, but includes promoting the

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[7] *Id.* *See also* footnote 35, *infra*.

[8] *Buckley v. Valeo*, *supra* 424 U.S. at 24 n. 25, 46 n.53 ("Expenditures by persons and associations that are 'authorized or requested' by the candidate or his agents are treated as contributions under the [federal] Act."). *See, e.g.*, Alaska Admin. Code Tit. 2, § 50.313; Ariz. Rev. Stat. Ann. § --(5)(b)(vi); Cal. Gov't Code § 82015 (West); Colo. Rev. Stat. § 1-45-103; Conn. Gen. Stat. Ann. § 9-333b(a)(4)(West); Haw. Rev. Stat. § 11-207(a); Ky. Rev. Stat § 121.150(1); Me. Rev. Stat. Ann. Tit. 21-A, § 1015(5)(West); Mont. Admin. R. 44.10.517; N.Y. Elec. Law § 14-100(9)(3)(McKinney) and R.I. Gen. Laws § 17-25-10(a).

public's perception of the integrity of the electoral process. Public confidence in the process is as essential to self-government as the marketplace of ideas. Permitting unlimited issue advocacy and truly independent expenditures, while placing dollar limits on coordinated party expenditures, is narrowly tailored to advance that interest.

ARGUMENT

CRC makes essentially two arguments supporting its contention that §441a(d) is unconstitutional on its face. *First*, CRC argues that expenditures by political parties cannot be regulated as contributions, but must be treated constitutionally as independent expenditures.[9] *Second*, CRC argues that modern political parties are incapable of corrupting their nominees, so §441a(d) is not sufficiently narrowly tailored in advancing the States' compelling interest in deterring corruption, and the appearance of corruption, of elected officials.

There are short answers to both these contentions. *First*, expenditures by political parties are not truly independent, but are inherently coordinated with the party's nominee. This Court has long held that coordinated expenditures are properly regulated as

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[9] *See* Brief for Petitioners at 35 ("More fundamentally, regardless of whether the label 'expenditure' or 'contribution' is attached to the party's speech, the nature of the party conduct being restricted makes clear that the same protections must be afforded here as were afforded to the expenditures in *Buckley*, *MCFL*, and *NCPAC*").

contributions.[10] *Second*, the compelling interests recognized by this Court are not limited to actually corrupting candidates with "corruptive payments." Brief for Petitioners at 30. Otherwise, the Court would have stricken contribution limitations as overbroad and held that antibribery statutes are the extent to which States may regulate campaign finance.[11] Instead, this Court squarely held that the States' interest in preventing erosion of the public's confidence in our system of self government is compelling, and that regulating both contributions and coordinated expenditures is narrowly tailored to advance that interest by reducing the appearance that contributors subsequently obtain a *quid pro quo* influence upon public policy.

I. THE COMPELLING INTEREST IDENTIFIED IN *BUCKLEY* INCLUDES PREVENTING THE APPEARANCE OF CORRUPTION AND PROTECTING THE PUBLIC'S CONFIDENCE IN THE INTEGRITY OF THE POLITICAL PROCESS

CRC contends that the constitutionality of political party expenditures may be determined only by equating them with truly independent expenditures, even if the party expenditures are inherently coordinated with the candidate. CRC begins with the erroneous premise that the Court has never upheld an expenditure limitation, but

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[10] *See* footnote 6, *supra*, footnote 35, *infra*.

[11] 424 U.S. at 27-28.

has only upheld contribution limitations. Brief for Petitioners at 23. CRC reasons that political parties do not have contributors' capacity to corrupt candidates, and that limiting parties' coordinated expenditures therefore does not advance the States' interest in avoiding the appearance of corruption. Brief for Petitioners at 30-34. This argument simply misconceives the interests recognized by this Court as sufficiently compelling to warrant regulation of campaign finances.

In *Buckley*, appellants contended contribution limitations were not sufficiently narrowly tailored because they were not the least restrictive means available to deal with "proven and suspected quid pro quo arrangements."[12] Appellants contended that anti-bribery statutes and disclosure requirements were the maximum governmental regulation constitutionally allowable.[13] This Court rejected that contention and squarely held the States' compelling interests are not limited to "only the most blatant and specific attempts of those with money to influence governmental action."[14] Instead, the Court held the compelling interests include restoring "confidence in the system of representative Government,"[15] and upheld

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[12] 424 U.S. at 27.

[13] 424 U.S. at 27-28.

[14] 424 U.S. at 28.

[15] 424 U.S. at 27, quoting, *Civil Service Commission v Letter Carriers*, 413 U.S. 548, 565 (1973).

limitations on both contributions and coordinated expenditures.[16]

CRC ignores the square holding in *Buckley* and argues that modern political parties are incapable of corrupting individual candidates. CRC says:

> The government has been unable to prove that a limitation upon party expenditures is necessary to prevent corruption because modern political parties do not "corrupt" elected officials. ... Moreover, the stringent limit on sources of party funds and the comprehensive requirements of public disclosure prevent any theoretical use of parties **as a conduit for corruptive payments.**

Brief for Petitioners at 30 (emphasis supplied).

This argument misapprehends the central teaching of *Buckley*. The States' interests are not limited to "only the most blatant" bribes, but include the public's confidence in the integrity of the process; which is as essential to self-government as freedom of speech.[17]

The dispositive issue in *Buckley* was defining the scope of the States' interests which are sufficiently compelling to warrant narrowly tailored regulation of

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[16]*See* footnote 6, *supra*, footnote 35, *infra*.

[17]424 U.S. at 26-27.

campaign finance. In *Buckley*, this Court agreed with the D.C. Circuit that Congress had a compelling interest not only in preventing particular contributors' undue influence over particular candidates', but also in alleviating the public's perception that elected officials were responding only to moneyed interests rather than the public interest.

The *en banc* D.C. Circuit identified this interest as one that had been recognized previously by this Court:

> The Constitution also takes account of the governmental interest in curbing the appearance of undue influence, in order to avoid the corrosion of public confidence that is indispensable to democratic survival. In *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973), Justice White articulated this:
>
> > [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be

> eroded to a disastrous extent.[18]

In *Buckley*, this Court also quoted *Civil Service Commission v. Letter Carriers*, explicitly reaffirming that the interest in avoiding corruption includes preserving public confidence in the integrity of the process:

> To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined. ...
>
> Of almost equal concern as the danger of **actual** quid pro quo arrangements is the **impact of the appearance of corruption stemming from public awareness** of the opportunities for abuse inherent in a regime of large individual financial contributions. ... Congress could legitimately conclude that **the avoidance of the appearance of improper influence "is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent."**[19]

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[18]*Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975) (en banc), quoting, *Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973)

[19]424 U.S. at 26-27, quoting *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565 (1973) (emphasis supplied).

Accordingly, the compelling interests identified by this Court in *Buckley* included the interest in avoiding the public's perception that the political **process**, **itself**, was corrupt because the influence wielded by the special interests overwhelms the public's interest.[20] This Court specifically recognized that public confidence is essential to any system of representative self-government.

This threat to the political process was again recognized by this Court in *California Medical Association v. F.E.C.*, which identified the government's compelling interests as "preventing the actual or apparent corruption of the political **process**."[21] Subsequently, in *Federal Election Commission v. National Right to Work*, a unanimous Court emphasized that, in Buckley:

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[20]This erosion of the public's confidence in the integrity of the system was identified by the D.C. Circuit:

> Large contributions are intended to and do, gain access to the elected official after the campaign for consideration of the contributor's particular concerns. Senator Mathias [in the FECA Congressional Findings,] not only describes this but also the corollary, that the feeling that big contributors gain special treatment produces a reaction that the average American has no significant role in the political process.

Buckley v. Valeo, 519 F.2d at 838. Indeed, the D.C. court reproduced an opinion poll which revealed that in 1974, nearly 70% of voters agreed with the statement that "the government is pretty much run by a few big interests looking out for themselves [rather than] run for the benefit of all the people." *Id.* at 839.

[21]453 U.S. 182, 197-198 (1981)(emphasis supplied).

> we specifically affirmed the importance of preventing **both** the actual corruption threatened by large financial contributions and **the eroding of public confidence in the electoral process through the appearance of corruption.** These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."[22]

The compelling nature of the interest in protecting the integrity of the process was most recently reaffirmed in *Austin v. Michigan Chamber of Commerce*, where this Court once again looked beyond the financial quid pro quo to recognize Michigan's compelling interest in resisting:

> a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.[23]

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[22]459 U.S. 197, 208 (1982), quoting, *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957), *See also Federal Election Commission v. Massachusetts Citizens For Life*, in which the Court similarly acknowledged "the historical role of contributions in corruption of the electoral process." 479 U.S. 238, 260 (1986)(emphasis supplied).

[23]494 U.S. 652, 660 (1990).

CRC attempts to distinguish *Austin*, and to distinguish political parties from corporations, PACs and unions, by arguing that "parties are not captive to narrow economic interests which are often viewed as corruptive." Brief for Petitioners at 32. This contention is belied by both the facts before this Court in *Buckley* and by the current pattern of political party contributions.

In *Buckley*, the D.C. Circuit noted that the agreed findings in that case established:

> [O]ne percent of the people accounted for 90 percent of the dollars contributed to federal candidates, political parties and committees. Just 2-3 percent, the wealthiest people in the country, are responsible for about 95 percent of the financing for Congressional elections.[24]

Moreover, the D.C. Circuit acknowledged that the Congressional findings demonstrated that the money was intended to buy influence rather than demonstrate support for either the candidate or the candidate's party:

> The findings document lavish contributions by groups or individuals with special interests to legislators from **both parties**, e.g., by the American Dental Association to incumbent Congressmen in California ...; by H. Ross Perot, whose company supplies data processing for medicare and medicaid

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[24]519 F.2d at 837.

programs, to members of the House Ways and Means and Senate Finance Committees, and the House Appropriations Subcommittee for HEW.[25]

Nor has the practice of special interests contributing to **both** political parties declined since the *Buckley* decision. As the authors of one article note:

> In the 1992 election cycle, the two major political parties raised a total of $83.4 million in soft money (Republican Party--$48.9 million; Democratic Party--$34.5 million). Of this total amount, $37.8 million (or 45%) was raised in contributions of $100,000 or more. The overwhelming majority of soft money contributions was concentrated among the big business interests seeking to gain further influence in Washington. The financial, insurance, and real estate industries gave a total of $10.9 million in soft money to the Republican Party in 1992 **and** a total of $6.3 million in soft money to the Democratic Party. The communication and electronic industry gave more than $3.3 million to the Republicans **and** more than $4 million to the Democrats.[26]

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[25] *Id.* at 839, n.37.

[26] J. Raskin and J. Bonifaz, THE CONSTITUTIONAL IMPERATIVE AND PRACTICAL SUPERIORITY OF DEMOCRATICALLY FINANCED ELECTIONS, 94 Columbia L. Rev. 1160, 1181, n.76 (1994) (citations omitted)(emphasis supplied).

As these authorities make clear, special interests contribute to both parties to purchase influence with both, rather than to support one party over another in order to reflect the agreement of those special interests with the platform of a particular party or a particular candidate. The attempt to purchase pervasive influence with all candidates, in order to wield pervasive influence despite the outcome of the elections, is exactly the type of corruption of the entire process that *Buckley* held the States may attempt to prevent. Because special interest funding of parties erodes the public's confidence in the democratic process, limiting coordinated party expenditures is supported by the compelling interest in preserving the integrity of the democratic process:

> Voter turnout clearly decreases with income and socioeconomic status. This relationship should come as no surprise, since voting is primarily an "affirmation of belonging" to the political system. If it is true, especially for educated citizens that "the most important benefit of voting ... is expressive rather than instrumental," then disproportionate nonvoting among the less-affluent expresses profound alienation from the political and governmental process. The wealth primary [the process of raising and spending campaign cash] is a significant, although certainly not exclusive, cause of this disaffection because it creates both the reality and the appearance of a government

responsive to wealth above all else. In a recent poll, eighty-five percent of Americans stated that they felt that campaign contributions buy the loyalty of candidates, and seventy-four percent said that they believed that Congress is largely owned by private special interests.

> Moreover, the Institute for Southern Studies has found that "people are more likely to vote in states that make registration easy while tightly regulating political contributions."[27]

A political party's capacity to actually funnel "corruptive payments" to its nominees is simply not germane to the dispositive inquiry. This Court should continue to adhere to *Buckley*'s identification of the compelling nature of the States' interest in protecting the public's confidence in the integrity of the electoral process. This Court should reaffirm the holding in *Austin* that the States have a compelling interest in preventing the corrosive effects of immense aggregations of money that have little or no correlation to the contributor's support for the ideas of any candidate or political party. When these interests are recognized, regulating coordinated expenditures by parties is clearly constitutional.

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[27]Raskin and Bonifaz, *supra*, 94 Columiba L. Rev. at 1181-82 (citations omitted).

II. REGULATING COORDINATED EXPENDITURES AS CONTRIBUTIONS IS ESSENTIAL TO FURTHERING THE COMPELLING INTEREST IN PROTECTING THE INTEGRITY OF THE ELECTORAL PROCESS.

Buckley identified contribution limits as essential to furthering the compelling interest in preventing the corruption and the appearance of corruption inherent in a system of unlimited financial contributions. Specifically, the *Buckley* Court held:

> These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.[28]

In upholding the contributions limits as narrowly tailored to support these compelling interests, the *Buckley* Court included coordinated expenditures within the

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[28]424 U.S. at 27.

definition of contributions.[29] Thus, CRC is just plain wrong in stating that: "No previously challenged FECA expenditure limitation imposed upon individuals, political associations or non-business entities has survived First Amendment scrutiny in this Court."[30] *Buckley* explicitly stated:

> In Part I we discussed what constituted a "contribution" for purposes of the contribution limitations set forth in [the Act]. **We construed that term to include not only contributions made directly or indirectly to a candidate,** political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, **but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate. ... So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.**[31]

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[29]424 U.S. at 35-37, 46, 46 n. 3, 78-79.

[30]Brief for Petitioners at 23.

[31]424 U.S. at 78 (emphasis supplied). The Court also held:

> The expenditure of resources at the candidate's direction...provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for [the items]. ...Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign.

424 U.S. at 36-37.

CRC nevertheless attacks the FEC for treating "all party expenditures as 'coordinated,'"[32] implying this approach is unique to the FEC's regulations.[33] But *Buckley* itself analyzed coordinated expenditures as contributions,[34] and this Court's decisions in the cases following *Buckley* uniformly agree that contributions are

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[32]Brief for Petitioners at 35.

[33]Petitioners assert "11 C.F.R. § 110.7(b)(4), cannot alter this result, for the distinction is one of constitutional origin completely unaffected by agency action." Id.

[34]*See* footnotes 6, 8, 29, *supra*, footnote 35, *infra*. Indeed, CRC's statements in this regard are somewhat misleading. CRC states that:

> "No First Amendment challenge to §441a(d) was presented in *Buckley*. This Court, however, perceived the First Amendment issue and made clear that the issue survived the Court's disposition of a Fifth Amendment claim. 424 U.S. at 58 n.66."

Brief for Petitioners at 23. **But**, footnote 66 in *Buckley* did **not** preserve this issue for future adjudication. While the Court did note that Appellants had not challenged the predecessor to § 441a(d) on First Amendment grounds, but only on Equal Protection grounds, the Court clearly upheld similar restraints on coordinated spending. *See* footnote 34, *supra*. The Court did not indicate party expenditures might be viewed differently. *See* footnote 35 *infra*.

properly defined as including: (i) expenditures made for goods or services provided directly to the candidate, and (ii) those expenditures that expressly advocate the election or defeat of a clearly identified candidate which are made in cooperation, consultation or concert with the candidate.[35]

Moreover, *Buckley* and its progeny recognize that political party expenditures are inherently made in cooperation with, with the consent of, or in consultation with the candidate, and; that limitations on party expenditures which advocate the support or defeat of a clearly identified candidate therefore fall squarely within the body of law regulating contributions.[36] In defining "political committees" for the purposes of identifying those groups subject to the disclosure provisions, so that those provisions would not "reach groups engaged purely in issue discussion," *Buckley* held that:

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[35]*See, e.g., FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 29 n.1 (1981); *California Medical Association v. FEC*, 453 U.S. at 199 n.19; *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 259-260.

[36]The Court said:

> Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than §608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.

424 U.S. at 46-47.

> To fulfill the purposes of the Act [the definition of political committee] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. **They are, by definition, campaign related.**[37]

In *FEC v. Democratic Senatorial Campaign Committee*,[38] this Court expressly recognized the expenditures by political parties are inherently coordinated and, therefore, may be limited:

> Expenditures by party committees are known as "coordinated" expenditures and are subject to the monetary limits of § 441a(d). Party committees are considered incapable of making "independent" expenditures in connection with the campaigns of their party's candidates.

In sum, this Court has never equated party expenditures with truly "independent expenditures." This Court has consistently distinguished inherently coordinated expenditures from independent expenditures, and the Court should not retreat from that holding.

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[37]424 U.S. at 79.

[38]454 U.S. 27, 28 n.1 (1981).

Limiting the inherently coordinated contributions of political parties prevents circumvention of the contribution limitations by preventing parties from serving as a conduit for contributors who know their contributions will be expended in support of the candidate as surely as if made directly to the candidate or the candidate's campaign committee.[39] For these reasons, this Court in *California Medical Association v. FEC*, rejected an argument similar to that made by CRC in the instant case:

> We also disagree with appellants' claim that the contribution restriction challenged here [limiting the amount of contributions that a multi-candidate political committee could accept] does not further the governmental interest in preventing the actual or apparent corruption of the political process. Congress enacted §441a(a)(1)(C) in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*. ... If appellants' position--that Congress cannot prohibit individuals and unincorporated associations from making unlimited contributions to multicandidate political committees--is accepted, then both these contribution limitations could be easily evaded.[40]

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[39]424 U.S. at 47.

[40]453 U.S. 182, 197-198 (1981). In his concurring opinion, Justice Blackmun distinguished between upholding contribution limits to multicandidate committees and to groups organized to make truly independent expenditures:

Finally, CRC claims that limiting party expenditures made to support or defeat a clearly identified candidate inhibits issue advocacy by parties.[41] But, as *Buckley* noted in upholding contribution limits in general, limits on coordinated expenditures leave open the alternative of issue advocacy by the party and of truly independent expenditures by the party's members.[42]

Since contribution limits are essential to furthering the compelling interest in avoiding the reality and the appearance that money buys elections and influence with

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> Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat.

Id. at 203 (Blackmun, J., concurring). *See, also* footnote 36, *supra*.

[41]*See* Brief for Petitioners at 21 ("*Buckley* also stressed that contributors may engage in unlimited independent speech. Unlike individuals and every other political association, political parties are stringently limited by §441a(d) in what they can say in connection with an election").

[42]424 U.S. at 22. "Unshackling political parties" would produce more issue oriented campaigns, according to Petitioners. See Brief for Petitioners at 33. However, since the advent of public financing in Kentucky gubernatorial elections, the opposite has been true. Kentucky treated all political party expenditures which clearly advocated the election of the party's nominee or defeat of his opponent as contributions limited to $500. As a consequence, each political party raised and spent $1 million in old fashioned, party platform, issue advocacy in addition to their nominee's allotted $1.8 million for campaign expenditures. The result was a voter turnout of historic proportions. *See*, The (Louisville) Courier-Journal, Nov 26, 1995, p. D3, Col 1.

the elected, there is no reason to exempt political parties from limits on contributions.

The interest in upholding such limits is especially important in States with public financing. Under these State public financing systems, candidates may choose to accept spending limits and accept public financing, but they need not. They are free to reject spending limitations and to reject the public funding attached to them.

As with Presidential elections, the States' public financing systems are premised on a simple arrangement: in exchange for a voluntary agreement to adhere to campaign spending limits, a candidate receives public funds matching the candidate's private contributions. Because public funding of elections provides the only vehicle under prevailing case law for limiting a candidate's aggregate expenditures, the ability to make an end-run around both contribution and expenditure limits is particularly alarming to States with such legislation. Allowing the candidate's party to make unlimited expenditures advocating the candidate's election or the opponent's defeat would eviscerate both the contribution limits and the voluntary spending limits which accompany public financing. As the three-judge district court held in *Republican National Committee v. FEC:*

> The public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed. If a

> candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated. ... **Thus the conditions placed on the expenditure of public funds are necessary to the effectiveness of a program which furthers significant state interests.**[43]

Similarly, a determination by this Court that political parties could make unlimited expenditures on behalf of their candidates would make the public funding option a nullity since the voluntary spending limits could be totally evaded by unlimited party spending.[44]

CONCLUSION

Political parties can easily serve as conduits for the infusion of large quantities of special interest money into the candidate's campaign coffers, directly or by coordinated expenditures. Preventing unlimited party expenditures on behalf of a candidate is, therefore, narrowly tailored to advance the compelling interest in preventing corruption of the electoral process and in

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[43]487 F.Supp. 280, 285-86 (S.D.N.Y.) (three-judge court), *aff'd.*, 445 U.S. 955 (1980) (emphasis supplied).

[44]If this Court invalidates § 441a(d), it should expressly reserve for future decision the question whether a party's nominee's may voluntarily elect to limit the spending not only of the nominee's campaign committee, but also of the nominee's political party.

preventing an end run around contribution limits. This Court should not retreat from its prior holdings that limitations on such coordinated expenditures are narrowly tailored means of furthering the compelling interest in protecting the public's perception of, and confidence in, the integrity of the political process.

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APPENDIX A

LIMITATIONS ON POLITICAL PARTY CONTRIBUTIONS

STATE NAME	LIMIT
ARKANSAS	Limited to $2,500 per candidate per election.
CALIFORNIA	Limits of $5,000 per candidate per special election or special runoff only.
DELAWARE	Limited by office.
FLORIDA	Party may not contribute to candidate for judicial office. Party limited in contributions to candidates receiving public financing. Generally, $50,000 limit, with no more than $25,000 in last 28 days before general election.
GEORGIA	Limited to $5,000 in the aggregate to statewide candidates in an election year, and $1,000 in the aggregate in a non-election year. Limited to $2,000 in the aggregate to general assembly and other candidates in an election year, and $1,000 in the aggregate in a non-election year.

STATE NAME	LIMIT
HAWAII	Limited to $50,000 for Governor; $40,000 for Lt. Governor; $25,000 for partisan mayor and prosecuting attorney; $20,000 for state senate and partisan offices of county council; $15,000 for state representative.
KENTUCKY	Limited to $500 per slate per election.
MAINE	Limited to $5,000 per candidate per election.
MASSACHUSETTS	State party committees limited to contributions of not more than $3,000 per candidate, per year.
MICHIGAN	State central: $68,000 - , Governor/Lt. Governor, $10,000 - Senate, $5,000 - House, $68,000 - all other state elective offices.

STATE NAME	LIMIT
MINNESOTA	Governor/Lt. Governor: Limited to $20,000 per election year and $5,000 in a non-election year. Attorney General: Limited to $10,000 per election year and $2,000 in a non-election year. Other Statewide offices: Limited to $5,000 per election year and $1,000 in a non-election year. State Senate/State Representative: Limited to $5,000 per election year and $1,000 in a non-election year.
MISSOURI	Limited to $10,000 for a statewide office candidate; $5,000 for a senate candidate; $2,500 for a house candidate; and 10 times allowable individual contribution limit for other candidates.

STATE NAME	LIMIT
MONTANA	All political committees of a political party on the ballot at most recent gubernatorial election, limited for all elections in a campaign to aggregate of $15,000 for Governor/Lt. Governor; $5,000 for other statewide candidates; $2,000 for public service commissioner; $800 for state senator; and $500 for other candidate. Contributions to judicial candidates prohibited.
NEBRASKA	State statewide and legislative candidates are limited to maximum amount of aggregate contributions in election years that may be accepted from independent committees; businesses (including corporations); labor unions; industry, trade, or professional associations; and political parties: Governor - $750,000; Secretary of State, Treasurer, Attorney General, Auditor of Public Accounts - $75,000; Legislature, Public Service Commission, Board of Regents of University of Nebraska & State Board of Education - $25,000.

STATE NAME	LIMIT
NEW HAMPSHIRE	Political party, political committee limited to $1,000 per election if to candidate or political committee working on behalf of a candidate who does not voluntarily agree to limit campaign expenditures; otherwise unlimited.
NEW JERSEY	Political party state committee limited to $1,800 per candidate for governor per primary or general election; unlimited for candidates for non-governor office. County and municipal committees may not contribute to candidate for Governor; also limited in contributions to municipal party committee ($5,000 per year), candidates in other counties, and candidates in certain legislative districts containing county of county committee. Political party national committee limited to $50,000 per year to state party committee; otherwise, subject to PAC limits. Unlimited as to leadership PACs.

STATE NAME	LIMIT
OKLAHOMA	Limited per person or family to $5,000 to a political party committee or political action committee in a calendar year, $5,000 to a candidate/candidate committee for state office or municipal office in a municipality of 250,000 or more for election campaign, and $1,000 to any other local candidate/candidate committee for election campaign.

STATE NAME	LIMIT
OREGON	Political party committees limited to aggregate contributions per election of $25,000 to candidate or principal campaign committee for Governor; $10,000 to candidate or principal campaign committee of candidate for Secretary of State, State Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of the Bureau of Labor and Industries; $5,000 to candidate for State Senator or State Representative; and $500 to candidate for Judge of Supreme Court, Court of Appeals, or Oregon Tax Court. As a political committee, prohibited from making contributions to other political committees except a candidate's principal campaign committee or political committee not organized exclusively to support or oppose national or party office candidates or measures.
RHODE ISLAND	$25,000 to any one party candidate (no limit on allowable in-kind contributions); unlimited for aggregate contributions to all party candidates.
SOUTH CAROLINA	Limited to $50,000 per statewide candidate per election, $5,000 per other candidate per election.

STATE NAME	LIMIT
TENNESSEE	Limited to $250,000 for statewide office, $40,000 for state senate, and $20,000 for other office in aggregate per election from all party committees.
WASHINGTON	Aggregate contributions per election cycle to state office candidates by a political party or a caucus of the state legislature are limited to 50¢ per voter in district (state legislative office candidate) or state (state executive office candidate) and by a major party county central committee or legislative district committee limited to 25¢ per voter in district (state legislative office candidate) or state (state executive office candidate). County central committees and legislative district committees may contribute for only those state legislative offices that include their jurisdiction. Aggregate contributions made by a single contributor other than a bona fide political party state organization within 21 days of a general election may not exceed $50,000 for a statewide office campaign or $5,000 for any other campaign.

STATE NAME	LIMIT
WEST VIRGINIA	Limited to $1,000 per candidate, per primary or general election, and $1,000 to state party executive committee per calendar year.
WISCONSIN	Unlimited; however, a political party or legislative campaign committee that files a statement under oath concerning independent candidate-related disbursements becomes subject to the limit for PACs. A candidate may not receive more than 65% of authorized disbursement level from all political committees.

Source: CAMPAIGN FINANCE LAW 96, Edward D. Geigenbaum and James A. Palmer, National Clearinghouse on Election Administration, Federal Election Commission.

APPENDIX B

EXPENDITURE LIMITS FOR CANDIDATES ACCEPTING PUBLIC FINANCING

STATE NAME	OFFICE
FLORIDA	Governor/Lt. Governor Secretary of State Attorney General Treasurer Comptroller Comm. of Agriculture
HAWAII	Governor Lt. Governor State Senate State House County
KENTUCKY	Governor Lt. Governor
MICHIGAN	Governor Governor/Lt. Governor
MINNESOTA	Governor/Lt. Governor Secretary of State Attorney General Treasurer Auditor State Senate State House
NEW JERSEY	Governor
RHODE ISLAND	Governor

STATE NAME	OFFICE
WISCONSIN	Governor Lt. Governor Secretary of State Attorney General Treasurer State Senate State House
PUERTO RICO	Governor

Source: COGEL BLUE BOOK, 9TH EDITION, CAMPAIGN FINANCE, ETHICS, LOBBY LAW & JUDICIAL CONDUCT, The Council of State Governments, Council on Governmental Ethics Law, May, 1993.